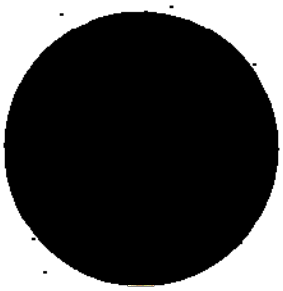

Federal Trade Commission

2005 ABA ANNUAL MEETING
Chicago, Illinois
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REFLECTIONS ON MY FIRST YEAR

Deborah Platt Majoras[1]
Chairman, Federal Trade Commission

Introduction

Thank you, Rich. It is a privilege to be here for your "last hurrah" as Chair of the Antitrust Section. I congratulate you on your productive tenure, and I thank you for being a tremendous friend and colleague. Don, congratulations on taking the gavel; I look forward to working with you.

I am particularly pleased to be here because I was unable to appear last year. Between the uncertainty of my confirmation status and a foot in a cast, a speech in Atlanta was simply not in the cards. Addressing you this year, however, gives me the chance to reflect on what will be, ten days from now, one full year on the job.

I had the fortune to inherit the leadership of a vibrant and effective agency. The scope and volume of our work for consumers continues to increase, and I am gratified that we have the resources to fulfill our important mission. The agency currently has a budget of $205 million and authorization for 1,074 FTE. The House of Representatives has passed legislation

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Attacking fraud that plagues the marketplace remains the core of the mission.[2] And we are increasing our work with criminal law enforcers to ensure that "fraudsters" are punished appropriately. Earlier this year, the FTC, the Department of Justice, the U.S. Postal Inspection Service, and 14 states announced an unprecedented law enforcement collaboration enforcers to target business opportunity fraud in a civil and criminal law enforcement sweep in which we announced more than 200 actions.[333]

spyware program, SpyKiller, that we alleged did not work.[5] And just this week, we announced a settlement with the makers of software called SpyBlast, which was advertised as free software to help consumers combat spyware, but which also downloaded tracking software on computers so it could deliver pop-up ads.[6]

Recognizing that enforcement alone will not eradicate these computer menaces, and as part of our continuing efforts to assist the private ma

enforcement actions. The Forums also featured discussions among law enforcement agency and community representatives about combating fraud directed at Hispanics.[9]

The National Do Not Call Registry now contains more than 98 million numbers. Although compliance has been high, we continue to enforce against Registry violations. The Columbia House Company, a home entertainment club marketer, recently settled FTC charges that it called subscribers who had placed their telephone numbers on the Registry, and who had made specific requests to the company that they not be called. Columbia House will pay a $300,000 civil penalty and is barred from making illegal telemarketing calls in the future.[10]

In addition to law enforcement, our policy research and development and our consumer and business education programs are vital to our work. Three weeks ago, the FTC, together with the Department of Health and Human Services, hosted a workshop on marketing, self-regulation, and childhood obesity.[11] The 600-plus attendees engaged in productive discussions about this serious public health issue, with a focus on industry self-regulation concerning the marketing of food and beverages to children, as well as initiatives to educate children and parents about nutrition.

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[9] *See* FTC Press Releases, *[illegible]* EMC /StylTT1 1
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Perhaps no consumer protection issue has absorbed more time and resources this year than data security. Recent news reports about the release of consumers' sensitive information from large commercial information services, retailers, and major banks, demonstrate that, if this data is not adequately secured, it can fall into criminals' hands and cause serious harm to consumers. Currently, 10 million Americans are victims of identity theft each year.[12]

The FTC's primary goal is to encourage all companies to put in place solid information security practices *before* a breach can occur. We believe that our law enforcement efforts are focusing firms on the issue. To date, we have filed five cases challenging false security claims under the FTC Act. In each case, we alleged that the defendants promised that they would take reasonable steps to protect consumers' sensitive information, but failed to do so.[13]

We recently filed and settled our sixth case in this area, for the first time alleging that inadequate data security can be an unfair business practice under Section 5 of the FTC Act.[14] In that action, the Commission alleged that BJ's Wholesale Club, a Fortune 500 company with over $6 billion in annual sales, failed to maintain adequate security for such information, even though the company had not made an express promise to maintain such security. Our settlement required BJ's to establish a comprehensive and rigorous information security program, and to obtain regular security assessments of that program from a qualified independent auditor. This action should provide clear notice to the business community that failure to maintain reasonable

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[12]*See* Consumer Fraud in the United States: An FTC Survey, at ES-2 (Aug. 2004), *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

[13]For documents related to these enforcement actions, see http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html.

[14]*See* FTC Press Release, *BJ'S Wholesale Club Settles FTC Charges* (June 16, 2005), *available at* http://www.ftc.gov/opa/2005/06/bjswholesale.htm.

and appropriate security measures in light of the sensitivity of the information can cause substantial consumer injury and may violate the FTC Act.

The FTC also educates consumers and businesses about the risks of identity theft and assists victims and law enforcement officials. The FTC maintains a website and a toll-free hotline staffed with trained counselors to advise victims on how to reclaim their identities. We receive roughly 15 to 20 thousand contacts per week on the hotline, or through our website or mail, from victims and from consumers who want to avoid becomi

information should be required to implement reasonable security procedures; and second,

whether to require firms to notify consumers if sensitive information about them has been breached in a way that creates a significant risk of identity theft.

Competition

So far in fiscal year 2005, the Commission has brought ten actions to prevent anticompetitive mergers, which collectively involved approximately $68 billion in commerce.[16] Of these matters, six were resolved by consent agreements, two transactions were withdrawn, and two transactions were modified or restructured to address possible staff concerns about competitive issues. The Commission also issued an opinion in which it found that Chicago Bridge & Iron ("CB&I") violated Section 7 when it acquired the assets of Picdrawn,

fourth related market, and the Commission found that the potential for anticompetitive effects suggested by the highly concentrated market structure was corroborated by substantial evidence of pre-acquisition competition in the relevant markets.[17] CB& I and Pitt-Des Moines were each others' closest competitors in the relevant markets, and customers frequently played one firm off against the other to obtain lower prices. In addition, in each market, entry was difficult and time-consuming.

In another significant merger decision, the Commission closed the *Arch Coal* investigation, following the district court's denial of the Commission's request for a preliminary injunction.[18] After careful review of the district court's decision, as well as the evidence obtained by staff before and after the court issued its ruling, a majority of the Commission applied the principles that the Commission had set forth in 1995[19] and concluded that administrative litigation would not serve the public interest. The Commission noted that (1) the district court had conducted a lengthy preliminary injunction hearing that allowed staff to present most of the evidence that staff would have presented at a full trial on the merits; (2) additional evidence obtained by staff after the district court issued its decision did not on balance support an administrative trial; (3) staff would have essentially duplicated its prior efforts at an administrative trial by presenting largely the same evidence that the district court had found

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[17]Commission Opinion, *In the Matter of Chicago Bridge & Iron Co.*, Docket No. 9300 (Jan. 6, 2005), *available at*

insufficient; and (4) the court of appeals corrected the most significant legal error by the district court. The district court had held that the Commission's case rested on a novel theory of

was filed to prevent Blockbuster from closing the transaction before it had produced pricing data that was important to determining whether the transaction was likely to reduce competition. Blockbuster had maintained, incorrectly, that it had complied with the Commission's information requests. The g(2) action was only the second in the Commission's history. The decision to file the g(2) action reflects the importance the Commi

from the record in a private action against Rambus.[27] In March 2005, the Eleventh Circuit reversed the Commission's ruling in the *Schering* case[28]

because its principles consistently are under attack. With each day I spend on the job, I am more convinced that antitrust enforcement alone does not adequately protect competition. Rather, we increasingly are called upon to stand up for markets and their inherent strength, which is found in competition.

Nowhere is this drawn into sharper focus than in the international arena, in which jurisdictions without market experience or competition cultures are adopting competition laws. While this is a positive development, we must work to ensure that important competition policy considerations not be subordinated to the desire to take enforcement actions. Enforcers, after all, get credit and gain respect for taking actions. Conversely, enforcers rarely get credit for what they do *not* do, for the actions they do not take, for leaving it to the market to sort out – even when that is the right answer. At the fourth annual ICN meeting, held in Bonn in early June, I told my counterparts from 80 jurisdictions that I believe we have a special charter – to stand up for competition and the vitality of markets – which has the greatest chance of benefitting consumers. It was particularly moving to have the opportunity to address a group that included enforcers from such nations as Russia, Latvia, Estonia, Sri Lanka, and Vietnam in the venue that housed the Western German Parliament before reunification and the move back to Berlin. This is an extraordinary time for global competition: 100 competition regimes where fifteen years ago we had twenty, many of them facing the challenges of acceptance within governments and societies not necessarily versed in or open to market principles. But competition enforcement without faith in competition is a house without a foundation – dangerous, indeed.

Even as I advocate for sound policy among my global counterparts, however, my own advocacy beyond our borders lays bare our weaknesses at home. In all corners, we find those

who seek protection from the sometimes harsh consequences of the free market. As challenges to private trade restraints have been successful – not to mention, expensive for the losing parties – the attractiveness of seeking public measures that will provide protection increases. Businesses almost always claim to support free markets and reject government interference – that is, until they want protection from government.

Competition enforcers have a responsibility to challenge protectionist measures. In *Kentucky Movers*, the Commission ruled that the Kentucky Households Goods Carriers Association, an organization of moving companies, had engaged in illegal horizontal price-fixing by participating in the collective setting of the rates that the movers charged to most consumers.[31] The Association claimed that its conduct was shielded from the antitrust laws by the state action doctrine. The primary issue was whether the state agency responsible for supervising the Association's ratemaking had engaged in the "active supervision" that is necessary for the state action doctrine to apply. The Commission found that the state agency's conduct fell far short of what was required to meet the active supervision requirement because the state agency had no formula or methodology for determining whether the movers' rates were reasonable, and the state agency did not even obtain any cost and revenue data that would allow it to make this determination.

In addition to cases, though, our competition advocacy program is active and growing. In 1989, this Section observed in a report on the FTC: "Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy

[31] *In the Matter of Kentucky Household Goods Carriers Association, supra* note 26.

on PBMs' ability to offer health plan sponsors low-cost pharmacy networks and how requiring PBMs to disclose financially sensitive information are likely to cause consumers to pay higher prices for health insurance. In both the North Dakota and California matters, the FTC was successful in persuading state decision makers that these bills were likely to harm consumers.

In addition, during the last year, the Commission commented on proposed and existing "sales-below-cost" laws, which prohibit retailers from selling gasoline to consumers below a statutorily-prescribed measure of cost.[35] Currently, eleven states have such laws. The Commission argued that such laws are likely to discourage competitive pricing by subjecting price-cutters to liability even when there is no likelihood of harm to competition. As a recent *Wall Street Journal* editorial piece explained in criticizing these laws, "antitrust is not about protecting competitors from more efficient, or more aggressive companies."[36]

Critical to being a champion for competition is understanding the marketplace, as well as educating the public on its workings. Last month, the Commission released a report entitled,

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Staff to Repepresentative Greg Aghazarian (Sept. 7, 2004), *available at* http://www.ftc.gov/be/V040027.pdf; Letter from Governor Arnold Schwarzenegger to Members of California State Assembly (Veto of Assembly Bill 1960) (Sept. 29, 2004) *available at* http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf.

[35]Letter from the FTC Staff to Michigan State Representative Gene DeRossett (June 18, 2004), *available at* http://www.ftc.gov/os/2004/06/040618staffcommentsmichiganpetrol.pdf; Letter from the FTC Staff to Kansas State Senator Les Donovan (Mar. 12, 2004), *available at* http://www.ftc.gov/be/v040009.pdf; Letter from the FTC Staff to Alabama State Representative Demetrius Newton (Jan. 29, 2004), *available at* http://www.ftc.gov/be/v040005.htm. *See also* Letter from the FTC Staff to Wisconsin State Representative Shirley Krug (Oct. 15, 2003), *available at* http://www.ftc.gov/be/v030015.htm; Letter from the FTC Staff to North Carolina State Senator Daniel G. Clodfelter (May 19, 2003), *available at* http://www.ftc.gov/os/2003/05/ncclsenatorclodfelter.pdf.

[36]Kimberly A. Strassel, *Another Reason to Love Wal-Mart*, THE WALL STREET JOURNAL, June 29, 2005, at A15.

majority, Justice Kennedy relied on the FTC's report multiple times for information about the characteristics of the wine industry. Justice Kennedy also frequently cited the report to support the Court's finding that neither state's law advanced a legitimate local purpose that could not be addressed by reasonable nondiscriminatory alternatives. Responding to the states' argument that the laws were needed to protect minors, the Court cited the report's finding that the 26 states that currently allowed direct shipments reported no evidence of increased alcohol sales to minors. The Court also relied on the report for its finding that the states' laws were not needed to maintain tax revenue levels, facilitate orderly market conditions, protect public health and safety, or ensure regulatory accountability.

In our advocacy work, we also frequently weigh in on proposed federal legislation, and are frequently successful in preventing the passage of legislation that would impede competition or protect market participants from antitrust enforcement. But the fact remains that several exemptions and immunities, which shield market participants from the discipline of antitrust law, remain on the books. While there conceivably may be rare instances when a market is better governed by regulation than by antitrust, there should be a sound, factually-supported reason why regulation and displacement of antitrust are necessary. If there is one thing that we have learned about markets, it is that they are not static. Yet, exemptions that are 50 or closer to 100 years old are still in effect.

It is time to re-examine the premises for the statutory antitrust exemptions enacted many decades ago. For example, "natural monopoly" justifications for exemptions have become increasingly less credible in recent years, given technological changes that enable multiple firms to compete. When another rationale, such as protection of a particular industry, underlies an

exemption, we should ask if that rationale is still valid in the current environment, especially in light of the general understanding, now spreading around the globe, that competition enhances consumer welfare.

I am pleased that the Antitrust Modernization Commission has added the statutory exemptions issue to their agenda, and I urge the members to look hard at whether these exemptions are still justified. I urge the Section to play a role in this examination. While I recognize the political sensitivity of the exercise, I do not think that it justifies permitting exemptions to persist if there is no current policy justification for doing so.

Finally, I ask you, the members of the antitrust bar, to increase your efforts to champion competition. When I gave my first speech after becoming a Deputy Assistant Attorney General in the Antitrust Division in 2001, I observed that the antitrust bar is impressive not only because it claims so many talented lawyers but because it claims lawyers who truly care about the integrity of our discipline. I still find that to be both impressive and gratifying. But what I also have come to recognize is that we need members of our bar not just to work with one another to debate and refine the application of antitrust law, but also to act as ambassadors throughout our society and globally for market principles and competition.

Our free market system, with its reliance on competition, requires public support. Our work in the international arena reminds us that we cannot take that support for granted. I once had a Brussels competition lawyer tell me that, listening to me speak, it was clear that I had a "passion for competition." I do, and I know you do, too. But we cannot keep that to ourselves; we need to take it outside of our circle. So, when you are thinking about writing projects, perhaps you could think beyond the usual antitrust and business publications and consider more

popular media and op-eds. Perhaps you could focus on analyzing instances in which competition has worked, rather than always on market failures. As you think about work in your community, perhaps you could consider guest teaching at a high school and telling kids about market principles and competition. And when you see competition principles under attack in legislative and other public debates, we can always use your help in educating and standing up for the competition point of view.

Thank you.