United States of America

Federal Trade Commission

I. Introduction

Good morning. Thank you to GCR and the chairpersons of the Antitrust Law Leaders' Forum for inviting me to speak, and to Ilene Gotts for such a warm introduction. I am delighted to be here.

As you all likely know, this year marks the Federal Trade Commission's (FTC) 100th anniversary, and I have entitled this keynote "100 is the New 30: Recommendations for the FTC's Next 100 Years." Institutions and people age at different rates, however, so for human years, I would like to claim that fifty (or fifty-one in my case) is also the new thirty.

All kidding aside, I do believe that despite hitting the century mark, the FTC is still dynamic and effective in pursuit of its core mission to promote competition and protect consumers. That does not mean there is no room for improvement, whether for the agency or for me personally. What I will address this morning is a framework for evaluating the agency's performance and my recommendations for improving the FTC's competition policy work in the future.

[1] The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

II. The FTC at 100 Report

One of the most satisfying opportunities in my career was when Bill Kovacic was FTC Chairman and I was the Director of the Office of Policy Planning, and he asked me to oversee an agency self-

participants on how to comply with the antitrust laws, we build support for our mission by offering predictability, which can also foster increased compliance with the law. Thus, to maintain the support of consumers, the business community, Congress, and other stakeholders, the FTC must be transparent and predictable in its enforcement activities. Although they may not always agree with the agency's action in every matter, these groups generally understand why we take certain enforcement actions and why we decide not to take such action or to use one of our many non-enforcement tools instead. Stakeholder support is critical to our ability to function effectively. In short, increased transparency and predictability improves the effectiveness and credibility of the FTC.

III. Recommendations for the Next 100 Years

As the FTC turns one hundred years old this year, we should use this opportunity not just to celebrate this milestone but to evaluate our strengths and weaknesses so that we can build on our successes and learn from our mistakes. From our administrative litigation to our internal resource allocation to our very jurisdiction under the FTC Act, we should evaluate everything we do, including how we measure success. Drawing upon the insights of the FTC at 100, I would like to respectfully suggest some areas of continued focus, as well as some potential changes for our agency as we enter our second century.

A. Use All of Our Many Available Tools

As many of you likely have heard me say during my time as a Commissioner, I am a strong advocate for the FTC using all of the tools it has available. In particular, the FTC should always consider the many non-enforcement tools it can use to help stop consumer harm before it arises, thus sparing consumers and businesses unnecessary losses and saving the taxpayer money that we would otherwise spend on litigation. Our non-enforcement tools include policy research and development, competition advocacy, and consumer and business education. Also, letting

information requests. We also are planning a benchmarking exercise in which we will be sending out information requests to another fifteen entities that assert patents. This latter group will be concentrated in the wireless telecommunication sector and include manufacturers, patent pools, and other entities in this space that license and assert patents. We are currently reviewing the sixty-eight public comments we received in response to our initial Federal Register Notice (FRN) to see how, if at all, we should modify the proposed study before issuing our final FRN.

A second non-litigation tool of great importance to the FTC's policy role is competition advocacy. This is an area of particular interest to me because, from 2004 to 2008, I was Director of the FTC's Office of Policy Planning, which oversees the agency's competition and consumer advocacy efforts. Now, as a Commissioner, I continue to support the FTC's efforts in advocating for procompetitive policies.

A recurring theme addressed by our advocacy letters is an attempt by a state legislature or regulatory agency to limit competition from newer or less established competitors that are able to supply comparable (or even superior) services, often at lower cost. A common example in the health care area, which is a significant focus of our advocacy efforts, involves regulations addressing advanced practice registered nurses, or APRNs, which are nurses with specialized training in particular areas. There has been an interest in many states in allowing basic medical services to be provided, not just by physicians, but by APRNs as well. Expanded licensing of APRNs could increase affordable access to quality care in rural and poorer areas of the country—

APRNs to allow them to provide certain treatments and to prescribe certain medications, subject, of course, to responsible measures to control for quality and safety.[11] In short, our advocacies have suggested that any limits on APRNs' ability to provide medical services should be no stricter than necessary to protect patient safety.

As the FTC moves into its second century, I will continue to push for the agency to pursue its important competition policy role through the use of the many tools in its toolbox, including, notably, its 6(b) authority and its competition advocacy efforts.

B. Stay Focused on Our Core Competency

My second recommendation is for the FTC to stay focused on our core competency, which is the development of the antitrust laws and competition policy more generally. To the extent that the agency decides to pursue an expansive standalone Section 5 agenda, however, we ought to clarify the scope of our Section 5 unfair methods of competition (UMC) authority before pursuing such an agenda.

1. Focus on Developing the Antitrust Laws

Despite recurring interest in the FTC's UMC authority under Section 5, in my view, our real success as an agency has come from using our administrative litigation function and our competition policy tools to develop the antitrust laws, particularly in the cases of novel or factually complex conduct. More specifically, conducting competition policy R&D (for example, holding workshops and issuing reports) to assess the economic impact of a particular

[11] *See, e.g.*, Letter from Fed. Trade Comm'n Staff to the Hon. Kay Khan, Mass. H.R., Concerning the Likely Competitive

business practice and then, if warranted, using an administrative trial and potentially a Commission opinion to pursue such practice as a violation of the antitrust laws is an extremely valuable means for developing those laws.

Accordingly, the Commission should focus primarily on improving the implementation of the antitrust laws, as we did in the matters that led to the Supreme Court decision in *Phoebe Putney*[12] and the Fourth Circuit decision in *North Carolina Dental*,[13] each of which clarified the proper scope of the state action doctrine. Other valuable contributions to the development of the antitrust laws include the Commission's *Unocal*[14] opinion in the *Noerr-Pennington Tf [(N)-3(or)- o41(6(l2(g)1*

2. Clarify the Scope of the FTC's UMC Authority before Invoking It

Factor 2: Lack of Procompetitive Justification/Disproportionate Harm Test. Second, to impose the least burden on society and avoid reducing businesses' incentives to innovate, the FTC should challenge conduct as an unfair method of competition only where: (1) there is a lack of any procompetitive justification for the conduct; or (2) the conduct at issue results in harm to competition that is disproportionate to its benefits to consumers and to the economic benefits to the defendant, exclusive of the benefits that may accrue from reduced competition.

Factor 3: Avoiding/Minimizing Institutional Conflict. Third, in using our UMC authority, the FTC should avoid or minimize conflict with the Department of Justice and other agencies. We also should always ask whether the FTC is the right agency to address the issue of concern.

Factor 4: Grounding UMC Enforcement in Robust Economic Evidence. Fourth, any effort to expand Section 5 beyond the antitrust laws should rely on robust economic evidence that the challenged conduct is anticompetitive and reduces consumer welfare.

Factor 5: Use of Non-Enforcement Tools as Alternatives to UMC Enforcement. Fifth, prior to using Section 5, the FTC should consider addressing a competitive concern via its many non-enforcement tools, such as conducting research, issuing reports and studies, and engaging in competition advocacy.

Factor 6: Providing Clear Guidance on UMC. Finally, the FTC must provide clear guidance and seek to minimize the potential for uncertainty in the UMC area, giving businesses a reasonable ability to anticipate before the fact that their conduct may be unlawful under Section 5.

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at http://www.ftc.gov/publicstatements/2013/01/statementcommissionermaureen-

Let me conclude this recommendation by noting that, as I indicated in my Section 5 speech, I believe a policy statement on our UMC authority is necessary if the FTC should define authority expansively. If this authority is limited to addressing the occasional invitation to collude or information exchange case, however, I do not necessarily see a need for a Section 5 policy statement.

C. Expand and Promote FTC Authority over Broadband Issues

Despite my concerns about expansive use of our UMC authority, I also believe there may be instances in which expanding our existing statutory authority would be in the public interest. For example, the exemption from our jurisdiction for communications common carriers frustrates effective enforcement with respect to a wide variety of activities—including privacy, data security, and billing practices—in the increasingly important telecommunications industry. With the convergence of telecom, broadband, and other technologies, it is time for Congress to remove this antiquated limitation on our jurisdiction and put these competing technologies on an equal footing. The Commission has testified in favor of repealing this exemption several times in the past,[22] and, as I recently testified before Congress, I support such a repeal.[23]

Further, within the broadband space, where the concept of network neutrality has been pursued for over a decade now and where the D.C. Circuit just struck down the Federal

[22] *See, e.g.*, Prepared Statement of the Federal Trade Commission on Consumer Privacy before the U.S. Senate Committee on Commerce, Science, and Transportation, 26 (July 27, 2010), *available at* http://www.ftc.gov/os/testimony/100727consumerprivacy.pdf

advocates constitutes facially anticompetitive conduct.[29] Rather, we should evaluate allegations of vertical integration, foreclosure, or price discrimination on the Internet the same way we do everywhere else—by balancing the procompetitive benefits against the anticompetitive harms of those restraints. Given its substantial expertise in analyzing competition (and consumer protection) issues in numerous online contexts, as well as our experience in assessing vertical competition issues, I believe the FTC is well positioned to be an alternative to the more invasive and proscriptive approach that network neutrality regulation imposes.

D. Continue to Pursue International Cooperation and Convergence

developing the China Anti-Monopoly Law (AML), which went into effect in 2008.[31] In addition to many informal exchanges, the two U.S. agencies submitted numerous written comments on draft implementing rules and guidelines.

More recently, FTC and DOJ officials participated in the second Joint Dialogue with China's three competition agencies. The FTC and DOJ officials also met separately with each agency and with the Supreme People's Court. The FTC also recently cooperated with MOFCOM in the Thermo Fisher/Life Technologies merger investigation.[32] We are seeking to build a strong, cooperative relationship with China and its competition agencies as they continue to develop and implement the AML. At the same time, we need to address with the Chinese agencies important issues with respect to the implementation of the AML, including transparency and procedural fairness in the investigative process, delays in the merger review process, remedies in merger matters, and antitrust issues that involve intellectual property rights.

Another, related goal for the FTC to continue to pursue is greater convergence upon substantive competition norms, procedural standards, and operational techniques. One of the top priorities of the FTC's international program is its work with multilateral fora, including in particular the International Competition Network (ICN), in developing best practices for the world's competition agencies. Through the ICN and other international fora, such as the OECD Competition Committee and the Asia-Pacific Economic Cooperation forum, the FTC has played a leading role in promoting convergence. Our goal is to convince other competition authorities

[31] For a discussion of the five-year anniversary of the AML, see Maureen K. Ohlhausen, *Illuminating the Story of China's Anti-monopoly Law*, ANTITRUST SOURCE, Oct. 2013, *available at* http://www.ftc.gov/public-statements/2013/10/illuminating-story-chinas-anti-monopoly-law.

[32] *See* Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Thermo Fisher Scientific Inc.'s Proposed Acquisition of Life Technologies Corp. (Jan. 31, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-thermo-fisher-scientific-incs-proposed.

to embrace sound competition policies, which are grounded in economic analysis, respectful of intellectual property rights, and fair and transparent for affected persons and businesses.

Our efforts both on a multilateral and bilateral basis are bearing fruit. We are harmonizing the thinking of enforcers around well-established substantive and procedural norms and are working together with dozens of agencies to handle specific cases in tandem. This valuable work improves the predictability, transparency, and economic efficiency of antitrust enforcement, thereby benefitting U.S. businesses and consumers, and it should remain a top priority for the agency over the next 100 years.

I next raised concerns about transparency and predictability in the *Bosch*[35] and *Google/MMI*[36] matters, which involved fair, reasonable, and nondiscriminatory (FRAND) licensing commitments made on standard-essential patents (SEPs). In my dissents in those two matters, I took issue with, among other things, the lack of transparency and predictability that these decisions provided patent holders and others subject to our jurisdiction.[37] In addition to

into the agency's merger analysis to firms contemplating transactions and the counselors who advise them.

For example, last November, the FTC closed its seven-month investigation into the proposed $1.2 billion merger of office supply superstores Office Depot and OfficeMax.[38] In light of its previous action to block the merger of Staples and Office Depot in 1997, the Commission issued a statement detailing the basis for its decision. The Commission described differences in the competition faced by office supply superstores in 1997 and today. For instance, other retailers such as Wal-Mart and Target, as well as club stores like Costco and Sam's Club, have expanded their office supply product offerings and now compete with office supply superstores. Additionally, Internet retailers of office supplies, most prominently Amazon, have grown quickly and significantly and compete with office supply superstores. As a result, the Commission did not find any potential harm to competition from this transaction. As an aside, I would note that agency predictability does not necessarily mean the agency reaches the same result in the same market over time, particularly when the relevant facts change, as they clearly did in the Office Depot/OfficeMax matter.

IV. Conclusion

To conclude, I acknowledge that there are certainly good things about being thirty, instead of 100 or even fifty-one. But, with age also comes wisdom, and I hope the agency will be guided by the wisdom in Chairman Kovacic's FTC at 100 Report as we enter our second century this year.

Thank you very much for your attention. I would be happy to entertain any questions you may have.

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[38] *See* Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., FTC File No. 131 0104 (Nov. 1, 2013), *available at* http://www.ftc.gov/public-statements/2013/11/statement-commission.