The Future of FTC Jurisdiction over Antitrust and Consumer Protection: A Commentary

By Commissioner Julie Brill
September 30, 2011

I'm honored to be here to comment on Commissioner Bill Kovacic's thoughts about the future of Federal Trade Commission jurisdiction over antitrust and consumer protection. Over lunch, a number of you said that you were looking forward to my "rebuttal." I'm sorry to disappoint; my talk will not be a traditional rebuttal. Rather, I will present something closer to a coloratura commentary on Bill's remarks.

But first, I'd like to sing a different song: a song in praise about Bill. Today is Bill's penultimate day as Commissioner of the Federal Trade Commission. Bill has been a tremendous Commissioner. I don't have the time needed to describe all of Bill's accomplishments, so I will spend a few moments describing some of the most notable ones.

As an academic, Bill Kovacic has been a prolific writer, substantially adding to the academic literature regarding Federal Trade Commission jurisprudence.

As General Counsel, Bill worked with then-Chairman Tim Muris to develop the Do Not Call Rule,[1] which is one of the most effective government consumer protection programs. For good reason, Dave Barry has called it the most popular government program since the Elvis stamp.

In addition, while Bill was General Counsel, the Commission issued its 2003 *Polygram Holding* decision.[2] In that case, the Commission addressed the extent to which the parent corporate entities of a joint venture may agree to restrict their own competition with the joint venture itself. Importantly, the case details how the Commission will analyze horizontal restraints it deems "inherently suspect" because they pose significant competitive hazards.

As Commissioner, Bill contributed significantly to our jurisprudence as author of the *Realcomp II Ltd.* decision,[3] which applied *Polygram*'s inherently suspect analysis to find that a Michigan-based realtor group violated the Federal Trade Commission Act by restricting the ability of member real estate agents to offer consumers lower-priced alternatives to traditional real estate services.

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[1] Telemarketing Sales Rule, 16 C.F.R. § 310.

[2] *Polygram Holding, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003), *aff'd, Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).*

[3] *Realcomp II Ltd.*, FTC Docket No. 9320, 2009 FTC LEXIS 250 (Oct. 30, 2009) (Opinion of the Commission), *aff'd Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011).

As Chairman, one of Bill's crowning achievements was his 2009 report, "The Federal Trade Commission at 100: Into Our 2nd Century, The Continuing Pursuit of Better Practices, A Report by Federal Trade Commission Chairman William E. Kovacic."[4] Bill undertook this endeavor because he noticed that the agency frequently talked about the need for agencies to self-evaluate their programs, to determine how they can best perform their mandated services to their constituents and stakeholders. Bill determined that the Federal Trade Commission should practice what it preached, and engage in the same process. So he conducted a series of in-depth roundtables, at which our colleagues and stakeholders, both domestically and internationally, addressed issues about how the Federal Trade Commission performs. Issues like: what does the Federal Trade Commission do well? What could we do better? And how can we get from here to there? I read the report when I first came to the Commission, and admired the scholarship and breadth of the undertaking. I've found the report to be helpful in my work ever since.

One of Bill's greatest legacies will undoubtedly be the prominence he brought to the agency in the arena of international competition. Bill has spent years tirelessly working with our counterparts around the globe to assist them as they develop institutional competition frameworks in their countries; part of this has included working with multilateral organizations. One needs only travel abroad with Bill to see how much he is beloved by our competition colleagues overseas. Bill is truly an international rock star.

Bill is also beloved by all of us within the Federal Trade Commission. Bill has a remarkable knack for breaking tension at meetings with humor. He knows everyone – and I mean everyone – at the agency by name, and spends time talking on a personal level to each and every employee who comes within his orbit.

Bill, you will be missed tremendously.

Turning now to competition and consumer protection, I agree with Bill that the combination of these two functions within the Federal Trade Commission is something we need to think about more carefully, and in a more systematic way. Such an endeavor will enhance our ability to protect consumers and competition.

Which, as Bill has noted, begs the question: how do we do it? How do we effectively integrate our consumer protection and competition functions?

There are some institutional and legal barriers to integration that would need to be considered and overcome. The Federal Trade Commission has two distinct bureaus that separately examine consumer protection and competition issues. Thus our structure is not like the United Kingdom's Office of Fair Trading, where everyone is housed within sectors or divisions inside one bureau, facilitating a smoother transition to full integration.

[4] The report is available at: http://www.ftc.gov/os/2009/01/ftc100rpt.pdf.

On the surface, the separation of the bureaus at the Federal Trade Commission is a matter of structure that we could alter with a few strokes of the pen. Indeed, our Bureau of Economics comfortably houses both competition and consumer protection functions under one director.

But there is a deeper divide between our two core functions that cannot be so easily eliminated. There is a divide of language and culture, in addition to structure. I have engaged in both consumer protection and antitrust enforcement nearly my entire adult life, and I can attest that there aren't many law enforcement attorneys who speak the language of both disciplines. At the Federal Trade Commission, those who are charged with mastering both disciplines are relatively few: the Commissioners, General Counsel, and Director of the Bureau of Economics. At the staff level, the differences in cultures are apparent. The types of attorneys who engage in competition enforcement usually differ – in background and temperament – from those who are attracted to consumer protection work. I believe that integrating the two cultures would be beneficial to both, as they each have something to learn from the other. Yet no one should be fooled about the considerable effort that would be required for smooth integration at the staff level of our competition and consumer protection functions.

Then, of course, the two disciplines operate under different laws, different precedents, and different rules, which could lead to further tensions. Notably, however, there are some important precedents and rules that they do share. One of the areas where we have focused a great deal of resources and attention is to emphasize the role of economics in both disciplines. This important development is the result of the work of Jim Miller, the former Chairman who we are honoring today. The rigor he brought to our analysis by highlighting the importance of economics spans across both our competition and consumer protection work.

Earlier this morning I heard a few complaints that the Bureau of Economics is left out of many consumer protection matters at the Federal Trade Commission. Let me assure you that this is not the case. There are some matters where the Bureau of Economics doesn't need to expend tremendous resources to give us its opinion; after all, deception is deception, and I know of no economists who would say that deception engenders benefits to competition or consumers. But there are many other consumer protection matters where the Bureau of Economics is fully engaged: our large consumer protection enforcement matters, policy initiatives, and rule-makings. Jim Miller's legacy highlighting the importance of economic analysis in all that we do continues to this day.

Despite the institutional, cultural, and legal hurdles, and despite the lack of a formal integrated structure like we see in the United Kingdom, I believe we are creating integrated teams – teams that bring together our attorneys and economists in the consumer protection and competition spheres – to focus on some cases where integration enriches our analysis. Our recent *Intel* investigation and settlement[5] represents one of the more recent – and now public – efforts where we employed a large team of both competition and consumer protection staff to focus on the many divergent issues raised in that case.

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[5] *In the Matter of Intel Corporation*, Docket No. 9341 (Dec. 16, 2009), *available at:* http://www.ftc.gov/opa/2010/11/intel.shtm.

I believe we will see greater integration of competition and consumer protection at the Federal Trade Commission going forward. And of course, this is a result of the types of commercial activities that are a top priority for us. For instance, when it comes to some of our cases involving high tech and the Internet, where the competitive effects of some activities may be uncertain due to rapid change, we might see an integrated team also consider the consumer protection issues that might arise. Overall, I'd like to see us achieve functional integration of the two areas where appropriate, even if we do not or cannot achieve actual structural integration.

A related question arises from the reason motivating some observers to think about the need to integrate consumer protection and antitrust at the Federal Trade Commission. As Bill has so eloquently put it, there are people who perceive a certain threat to the agency. I think, for most of you in the audience, that isn't true; most of you see the critical value provided by the Federal Trade Commission through our work protecting competition and consumers. But there are other policymakers who paint a different scenario.

Bill has alluded to this alternate universe. I think it goes something like this – Bill, please correct me if I'm wrong: the Department of Justice will take over antitrust enforcement, the Consumer Financial Protection Bureau will take over most of consumer protection; and maybe a new privacy agency will be created in the near future to focus on privacy enforcement. All divided up, nothing left. Again, I believe this is not realistic, because the Federal Trade Commission has garnered a formidible reputation through our strong and smart consumer protection and competition enforcement efforts. Yet it is worthwhile to spend a moment on the premise of this alternate universe. I believe it is predicated on the notion that, in this country, we shouldn't have two distinct federal agencies responsible for enforcing laws in any one area.

I want to challenge this premise. I believe there is tremendous value in having both the Federal Trade Commission and the Department of Justice examine competition issues at the federal level. There is strength in a dual law enforcement system. Of course, we don't want the confusion that would be engendered through two separate entities engaging in disparate rulemaking, or serving multiple subpoenas in the same matter. Those are obvious points, and I take them as given. Instead, I want to focus on the value of having two federal agencies that focus on the same area of law enforcement.

Today we have spent a lot of time discussing the desirability of building concepts from economics into competition and consumer protection law enforcement efforts. On the issue of the need for dual enforcement agencies, I would like to see us embrace an additional metaphor that comes from engineering: redundancy in safety systems. Think for a moment about how engineers design airplanes and automobiles. They build-in multiple layers of safety systems, sometimes redundant, to ensure a backup if one of the systems fails. I think this notion of redundancy in safety systems is an apt metaphor that we should incorporate into our thinking about how to design effective law enforcement.

So how does our current dual enforcement system measure up? Do we have effective redundant safety systems to ensure that there is appropriate enforcement of competition and consumer protection? I believe the answer is – increasingly – yes. Let me focus first on competition enforcement, and then turn to consumer protection.

In the arena of competition enforcement, we have one agency that is part of the administration, and the other is an independent agency. What does this allow? It gives the political system, through the administration, a leading voice in competition policy. To me, that is a good thing. Our political leaders should be able to address competition policy. And voters should have something to say about whether they approve of that policy. That is what our democracy is about. And yet, because of the critical role that competition plays in our society, we also need to have a failsafe to ensure effective enforcement through an agency like the Federal Trade Commission that examines competition issues through an independent lens.

Of course, the two agencies are not identical. Rather, they are endowed with some unique attributes that allow them to bring different perspectives to competition issues. The Department of Justice often approaches competition enforcement through its criminal enforcement perspective. Obviously, it has a huge civil portfolio, but it can uniquely examine matters with an additional perspective based on its experience in criminal enforcement. At the Federal Trade Commission, because we lack criminal enforcement authority, we defer to the Department on criminal matters. On the other hand, at the Federal Trade Commission, when we investigate competition cases we will think about our unique Section 5 authority. We will investigate some competition matters under both prongs of that authority: unfair methods of competition as well as unfair or deceptive acts or practices in or affecting commerce. The different perspectives of the two agencies allows for a wider field of vision across competition policy, which I believe enhances effective enforcement that benefits consumers.

I cannot help noting the irony: when we talk about the way in which competition policy ought to be structured in the United States, we do not consider the need for competition in regulatory ideas. I believe that there is value in regulators competing on ideas in a manner that promotes a race to the top, not a race to the bottom.

Harvey Goldschmidt, former SEC Commissioner and now professor at Columbia Law School, has spoken about the need to promote regulatory competition.[6] He believes that a decade ago, in the early 2000s, the Securities and Exchange Commission did not engage in appropriately aggressive law enforcement with respect to securities matters, and he applauds the states' efforts to step into the breach to examine important issues regarding securities regulation.

We can usefully examine whether the failure to fully embrace these concepts of redundancy in regulatory systems and regulatory competition with respect to consumer protection law enforcement has had a beneficial or negative impact. A complete examination of these issues would take much longer than I have with you this afternoon. And clearly, there are important benefits to streamlined, unitary law enforcement, including promotion of efficiency and consistency. However, we have suffered some painful consequences that came to light during the recent Great Recession by not fully embracing these concepts in our systems for protecting consumers with respect to financial products. Back in 2004 and 2005, several state

[6] Remarks of Harvey Goldschmid, "The Role of State Attorneys General in Corporate Governance," Columbia Law School National State Attorneys General Program Symposium, *available at:* http://www.law.columbia.edu/center_program/ag/Past_Conference/CorporateGov/Program?exclusive=filemgr.download&file_id=91234&rtcontentdisposition=filename%3DPanel%20One.pdf.

attorneys general and other financial regulators began to see serious problems in the mortgage area. Banks and mortgage companies were writing risky mortgages that consumers would be unlikely to be able to afford, due to the mortgages' high interest rates (after low teasers expired), excessive fees, and other hidden problems. Several state attorneys general discussed these problems with the Comptroller of the Currency at that time, asking the Comptroller to allow the states to work with federal regulators regarding the problems that needed to be addressed.[7] But the Comptroller refused, saying, in effect, "we are going to pre-empt you; you may not engage in law enforcement in this area." Had the Office of the Comptroller of the Currency been engaged in appropriately aggressive law enforcement and regulatory efforts in area, then its position that the states should be preempted might have been less troubling. But where, as here, the federal agency that was responsible (in part) for policing key mortgage activities called for preemption but was not engaged in smart, aggressive law enforcement where needed, the safety net for consumers disappeared. And we all know the results.

In drafting Dodd-Frank,[8] Congress was in part responding to this unfortunate circumstance. The Congressional plan to reform financial regulation in this country embraced the notions of redundancy in safety systems and ensuring a race to the top in smart, aggressive law enforcement. It created a system that allows three entities to engage in appropriate law enforcement activities: the Consumer Financial Protection Bureau, the Federal Trade Commission, and the states. It is important that all three entities coordinate their law enforcement work, so we don't double-team targets by issuing conflicting subpoenas or filing overlapping lawsuits. And rule-making needs to be centralized and coordinated so that industry has clear rules of the road. Congress designed the new redundant law enforcement safety system with all of that in mind, while also embracing the core principle that it needed to design a new system that would allow for smart and appropriate law enforcement, ensuring cases would be brought to the courts for fair adjudication, even if one of the players decided to focus its energies elsewhere, whether due to a political or philosophical change, or any other reason.

In conclusion, as we consider how to integrate our competition and consumer protection law enforcement systems in this country, there are many important principles to consider, including efficiency and consistency in the administration of justice. Let's add to the list two other important principles to consider: redundancy in our law enforcement safety net, and appropriate enforcement competition.

Thank you.

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[7] "They Warned Us About the Mortgage Crisis: State Whistleblowers Tried to Curtail Greedy Lending – and Were Thwarted by the Bush Administration and the Financial Industry," Business Week, Oct. 9, 2008.

[8] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).