The Federal Trade Commission

Maintaining our Focus at the FTC: Recent Developments and Future Challenges in Protecting Consumers and Competition

Keynote Address
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ABA Section of Antitrust Law
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I. Introduction

Good afternoon. I am delighted to return to the Fall Forum, and I thank Kathy Fenton and Toby Singer, two outstanding antitrust lawyers with whom I had the privilege of working, for inviting me to address you today. I value the contributions to sound antitrust enforcement and policy that the Section makes, and thank all of you for your commitment.

We have begun our work in Fiscal Year 2008, and transition looms on the horizon. By this time next year, in fact, we should know who the 44th President of the United States will be. Although we currently work in an environment sharply characterized by presidential election politics, the FTC is staying the course of conducting our business of protecting consumers and safeguarding competition (even as some in the antitrust bar join in the politicking). Over the 15-

[1] The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or of any other Commissioner.

year period that preceded my tenure, my predecessors endeavored to foster a nonpolitical environment for antitrust enforcement – an environment that I have sought to maintain, keeping our attention focused on bringing the appropriate enforcement actions and not letting anticompetitive mergers and conduct go without challenge. American consumers, as well as our fine career public servants, have the right to expect that.

I will spend our time together today highlighting some of the important work on our agenda, focusing on the industries we handle that most directly affect consumers, including health care, energy, technology, and retail and consumer goods, and then providing some reflections on what I see as challenges lying ahead and how we are endeavoring to address them.[2]

II. Health Care

Health care has been a significant part of our agenda, and strong efforts must continue in this nearly $2 trillion sector. Our recent contributions in this important area include the Commission's decision that Evanston Northwestern Healthcare Corporation's consummated acquisition of Highland Park Hospital was anticompetitive, resulting in higher prices for acute

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[2] As a general matter, this is a very busy time, with, for example, premerger filings increasing 20 percent in fiscal year 2007, continuing a multi-year climb begun a few years ago. Correspondingly, we issued 31 second requests in FY2007, and 22 of those matters resulted in enforcement actions or abandoned or modified transactions, including three in which we litigated preliminary injunction actions in federal district court. Although preliminary injunctions were denied in each of these matters, in the third case (*Equitable/Dominion*), the Third Circuit granted an injunction pending the appeal, and we await the court's decision on the state action issue in that case. Aside from mergers, we brought 11 nonmerger matters during the last fiscal year.

Taking a longer look back at the past three fiscal years, the FTC's competition work has produced 52 merger enforcement actions or withdrawals of mergers deriving from 84 second request investigations, and 21 nonmerger enforcement actions. During this same time period, we also completed 12 statutorily mandated rulemakings and reports; 8 public conferences and workshops, plus a set of hearings on issues arising under Section 2 of the Sherman Act; and 9 reports on competition issues significant to consumers.

care inpatient hospital services in parts of Chicago's northern suburbs.[3] We also have challenged several recent health care transactions and achieved substantial relief for consumers in the areas of generic drugs, over-the-counter medications, injectable analgesics, and several medical devices and diagnostic services. In addition, the Commission continues to work to detect and investigate anticompetitive agreements between drug companies that delay generic entry. Indeed, our federal court challenge to an alleged anticompetitive agreement between Warner Chilcott and Barr led to the introduction of lower-priced generic products to challenge Ovcon, a branded oral contraceptive.[4]

Without question, the overall challenge in U.S. health care markets is the cost: How can we contain steadily rising costs, while maintaining the life-saving innovation and quality that admirably characterizes the U.S. market? Health care costs are now approaching 16% of GDP, twice as much as the average for other OECD countries. The good news is that, as payors and providers work to cope with these rising costs, our uniquely competitive system is prompting the introduction of new and efficient models for care delivery. The challenge for the FTC, looking ahead, is to ensure that private and public restrictions do not conspire to inhibit the introduction of innovative solutions. Some of these solutions may work, and some may fail; but our job, as competition enforcers is to ensure that anticompetitive restrictions do not doom them to failure. For example, we have been looking at emerging markets for limited-service or "retail" health clinics and at early attempts by states to regulate them. Such new delivery models can make

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[3] *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Aug. 6, 2007) (opinion of the Commission), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

[4] *See* FTC News Release, *Consumers Win as FTC Action Results in Generic Ovcon Launch* (Oct. 23, 2006), *available at* http://www.ftc.gov/opa/2006/10/chilcott.shtm.

basic health care more accessible to more consumers. In September, FTC staff submitted comments to the Massachusetts Department of Public Health regarding draft regulations, which generally facilitated entry by such clinics.[5] In the comments, staff expressed concern, however, that a proposed requirement that all limited-service clinic advertising be pre-screened and pre-approved, a requirement imposed on no other clinics, could deprive consumers of useful information about available care and act as a barrier to entry for new competitors.

In other discussions concerning new public policy directions, we are part of the Federal Interdepartmental Health Information Technology Collaborative, formed as part of the President's Executive Order on the use of health care IT. The Collaborative, recognizing the great potential of new technology to improve the quality of health care, lower its costs, and increase its distribution, is looking at, for example, issues in telemedicine and the computerization of health records. Such developments also call for close attention to potential competition and consumer protection concerns, including unique privacy concerns, and we must stay at the forefront of understanding both the benefits and risks posed by health technology innovation.

Many new developments have occurred just in the time since the FTC, together with the Antitrust Division, delivered a 2004 report on the role of competition in the health care marketplace, following on a month's worth of hearings during the previous year.[6] We think,

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[5] Letter from FTC Staff to LouAnn Stanton, Esq., Office of the General Counsel, Massachusetts Department of Public Health (Sept. 27, 2007), *available at* http://www.ftc.gov/os/2007/10/v070015massclinic.pdf.

[6] *See* Improving Health Care: A Dose of Competition: A Report by the Federal Trade Commission and the Department of Justice (July 2004), *available at* http://www.ftc.gov/reports/healthcare/healthcarerptexecsum.pdf. The Agencies based this Report on 27 days of Joint Hearings, a Commission-sponsored workshop, and independent research.

therefore, that it is time for a "check-up." Thus, the FTC currently is planning a public event to examine both competition and consumer protection issues raised by new health care delivery models, building on our ongoing work in health and technology markets. I will make a more detailed announcement about that shortly.

In the meantime, however, our work must continue. As the debate over the FTC's reverse-payment cases shows, in the area of prescription drugs, our nation still struggles with striking the balance between protecting incentives to innovate, which hold the promise of bringing more life-saving drugs to market, and permitting the entry of generic drugs that drastically reduce prices for our citizens. As we would expect, branded and generic drug manufacturers alike continue to find new responses to forces in the current marketplace. For example, brand name manufacturers have responded to the Hatch-Waxman framework that provides a 180-day period of marketing exclusivity for the first generic filer by authorizing a competing generic under its original marketing authorization from FDA. Some assert that while these "authorized generics" provide short-term competition gains, they may nonetheless harm consumers over the long term because expected competition from authorized generics may decrease incentives for generic manufacturers to enter the market. Accordingly, two bills recently introduced in Congress would prohibit the marketing of authorized generics.[7] Given the importance of prescription drugs to American consumers, a better understanding of the impact of authorized generics is critical. Accordingly, the Commission is conducting a study of the short- and long-term effects of authorized generic drugs in the prescription drug market.[8] On October

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[7] H.R. 806, 110th Cong. (2007); S. 438, 110th Cong. (2007).

[8] Recent history confirms that policymakers take the FTC's findings in this area seriously. For example, Congress passed legislation in 2003 to amend Hatch-Waxman in part based on

2, we issued special orders requesting information from branded pharmaceutical manufacturers, and using the information they now have provided, the Commission plans to issue special orders to generic manufacturers in the near future.

Also in the area of prescription drugs, some have raised concerns about what has been called "product hopping" or "product switching." Innovator drug firms often introduce "follow-on" versions of their successful drug products. Product changes undoubtedly can be pro-competitive, introducing drug improvements, greater consumer choice, or new approved indications. Certainly, we do not want to discourage follow-on innovation and improvement. Questions have been raised, however, about certain situations involving follow-on drug marketing that some say amount to gaming the FDA regulatory system and state drug substitution laws. For example, has a manufacturer reformulated a drug just as a generic version is about to enter, and taken steps to prevent automatic generic substitution for the original drug at the pharmacy level – without any countervailing benefit, such as greater efficacy or reduced side effects? We are following controversies and research in this area, so that we can better understand the market issues and whether there is any role for antitrust law in addressing them.

Moving on to health care providers, as they have felt the squeeze on fees from payors, they have acted to protect those fees. The FTC has been active in challenging, for example, agreements among competing physicians and other health care providers to fix prices or restrain competition, including bringing two new cases during the last fiscal year.[9] We also have

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recommendations made in the FTC's 2002 Generic Drug Report. FTC, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

[9] *In the Matter of Advocate Health Partners, et al.*, FTC Docket No. C-4184 (Feb. 7, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0310021/0310021.htm; *In the Matter of*

continued to oppose, in state and federal legislatures, the passage of antitrust exemptions for various health care providers. Just last month, the FTC submitted testimony to Congress on a bill that would exempt non-publicly traded pharmacies – that is, independent pharmacies – from antitrust scrutiny.[10] Although the Commission is sympathetic to the difficulties faced by smaller pharmacies, the exemption threatens to raise prices for much-needed medicines, especially for seniors. It also threatens to increase costs to private employers who provide health benefits to their employees, and to the federal government, which was projected to have paid over 30 percent of the cost of prescription drugs in 2006, all without any assurance of higher-quality care. In our view, a broad and costly antitrust exemption for all non-publicly traded pharmacies would not benefit consumers.

Far more constructive and holding the potential to benefit consumers are newly proposed forms of "clinical integration." The agencies' 1996 joint Statements of Antitrust Enforcement Policy in Health Care expressly recognize the relevance of such integration to the antitrust analysis of health care provider networks.[11] In September, FTC staff issued an advisory opinion on a clinical integration program proposed by the Greater Rochester Independent Practice Association (GRIPA).[12] FTC staff concluded that the program involves substantial integration

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Colegio de Optometras, FTC Docket No. C-4199 (finalized Sept. 6, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510044/070911decision.pdf.

[10] Prepared Statement of the Federal Trade Commission Before the Antitrust Task Force of the H. Comm. on the Judiciary Concerning H.R. 971, "the Community Pharmacy Fairness Act of 2007," 110th Cong. (Oct. 18, 2007), *available at* http://www.ftc.gov/os/testimony/P859910pharm.pdf.

[11] Department of Justice & Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care (1996), *available at* http://www.ftc.gov/reports/hlth3s.pdf.

[12] The staff opinion letter is *available at* http://www.ftc.gov/os/closings/staff/070921finalgripamcd.pdf.

among its physician participants and has the potential to produce significant efficiencies in the provision of medical services. The program promises to expand upon GRIPA's existing programs – operated under risk-sharing arrangements with payers – in a number of ways, including development of a collaborative network of primary care and specialty physicians, collaborative development of evidence-based practice guidelines and quality benchmarks, and the integration of providers through a web-based clinical information system. We currently are exploring these and other examples in the marketplace and considering what more we might do to provide further guidance.

III. Energy

As it has for at least a quarter of a century, the Commission exercises special vigilance with regard to the energy sector and, in particular, with respect to markets for crude oil, gasoline, and other petroleum products. Energy consumers – and we are all energy consumers – demand this commitment of FTC resources, and thus, it, too, must remain high on the agenda.

In fiscal year 2007, the Commission has challenged three mergers in the energy industry: Western Refining's acquisition of Giant Industries;[13] the buyout of Kinder Morgan by its management and a group of investment firms, including The Carlyle Group and Riverstone Holdings;[14] and Equitable Resources' proposed acquisition of The Peoples Natural Gas Company.[15] We also charged the American Petroleum Company with illegally conspiring with

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[13] FTC News Release, *FTC Seeks to Block Western Refining's Proposed Acquisition of Giant Industries* (Apr. 10, 2007), *available at* http://www.ftc.gov/opa/2007/04/westerngiant.shtm.

[14] FTC News Release, *FTC Challenges Acquisition of Interests in Kinder Morgan, Inc. by The Carlyle Group and Riverstone Holdings* (Jan. 25, 2007), *available at* http://www.ftc.gov/opa/2007/01/kindermorgan.shtm.

[15] FTC News Release, *FTC Files Complaint in Federal District Court Seeking to Block Equitable Resources' Acquisition of The Peoples Natural Gas Company from Dominion Resources* (Apr. 13, 2007),

competitors to restrict the importation and sale of motor oil lubricants in Puerto Rico.[16] In August, the Commission and the Antitrust Division delivered to the President an FTC report on the likely causes of gasoline price increases during the spring and summer of 2006,[17] and our staff continues to monitor retail gasoline and diesel prices in 360 cities and wholesale prices in 20 urban areas in an effort to detect evidence of illegal conduct.

The challenge for the United States in the energy sector is a great one: maintaining a reliable and affordable supply of energy to power our productive and dynamic culture. The major challenge for the FTC is to continue to work to protect competition in these critical markets without folding to pressure to simply "do something," unduly interfering in a way that will only make matters worse for consumers. In this regard, we also have to continue our work to inform the public and its policymakers about the facts and the competitive conditions of this important marketplace. Facts, facts, facts. This means endeavoring to get past the myth that it is the large oil mergers, approved by the FTC in the late 1990s, that have caused prices to rise in the last few years.[18] And, thus, the story goes, if we just do something to constrain or perhaps

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available at http://www.ftc.gov/opa/2007/04/equitabletro.shtm.

[16] *In the Matter of American Petroleum Company, Inc.*, FTC Docket No. C-4198 (Aug. 21, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610229/070828do0610229.pdf.

[17] FTC, *Report on Spring/Summer 2006 Nationwide Gasoline Price Increases* (Aug. 2007), *available at* http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf.

[18] Earlier this year, the FTC released an analysis of horizontal merger investigations and enforcement actions from fiscal year 1996 to fiscal year 2005, which shows that the Commission has brought more merger cases at lower levels of market concentration in the petroleum industry than in any other industry, bringing enforcement actions in petroleum markets that are only moderately concentrated. Federal Trade Commission, *Horizontal Merger Investigation Data, Fiscal Years 1996-2005* Table 3.1, *et seq.* (Jan. 25, 2007), *available at* http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf; *see also* FTC Horizontal Merger Investigations Post-Merger HHI and Change in HHI for Oil Markets, FY 1996 through FY 2003 (May 27, 2004), *available at* http://www.ftc.gov/opa/2004/05/040527petrolactionsHHIdeltachart.pdf.

even break up, large oil companies operating in the United States, the problem will be solved. Holding on to this view is not just naive, it is downright dangerous.

In an effort to move the discussion beyond this same old story, in April, we held a three-day conference, *Energy Markets in the 21st Century: Competition Policy in Perspective*,[19] which brought together leading experts from the energy industry, government, consumer groups, and the academic community. Reflecting on our history, our first panel discussed how the United States dealt with the energy crisis of the 1970s and what we learned (or should have learned). As one expert panelist explained, the crisis became serious largely because government officials turned to allocations and price controls. The inevitable result was an imbalance between supply and demand, long lines at gas stations, and forms of hoarding that actually compounded the problems. The clear lesson is that there is a role for government in dealing with such crises, but it consists not of efforts to dictate the final quantities of price or supply, but rather in adopting forms of regulatory flexibility that will allow firms to find effective responses to a situation.

The conference also explored and underscored the complex – and sometimes conflicting – ways in which the achievement of environmental and energy security objectives intersects with the widespread desire for inexpensive energy supplies. There are significant trade-offs among the goals of cleaner air, greater energy security and safety, reduced energy consumption, and energy affordability that consumers and policymakers need to address, armed with full information as to the potential costs and benefits associated with various policy prescriptions. Although consumers may be willing to pay the prices that result from policies designed to achieve certain goals, first they must grasp the true nature and magnitude of those tradeoffs. To

[19] FTC Conference, *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr. 10-12, 2007), *available at* http://www.ftc.gov/bcp/workshops/energymarkets/index.html.

foster such understanding on the part of consumers and policymakers – on these and many other issues – we expect to issue a report in 2008 detailing key findings from our energy conference.

IV. Technology

Technology is developing quickly in response to consumer demand for "better, stronger, faster," and the high-tech industries remain high on the agenda. In February 2007, the Commission issued an opinion and final order on remedies in the legal proceeding against computer technology developer Rambus, Inc.[20] This is the Commission's first litigated case in the standard-setting area and, we believe, the first time in 22 years that the Commission has heard a monopolization case in administrative litigation.

The standards for Section 2 have particular import for high technology industries. The rapid pace of innovation in the United States is a result of free markets unfettered from strict regulation and government intervention. At the same time, however, it is important to continue to enforce the antitrust laws carefully in this area, because failing to do so may allow companies unlawfully to acquire a monopoly to the disadvantage of consumers. We must make sure that the agencies and courts develop and enforce rules that carefully balance the importance of free and robust competition to stimulating innovation with the need occasionally to intervene to prevent anticompetitive conduct from stifling that very innovation and harming consumer

[20] *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 5, 2007) (opinion of the Commission on remedy) (Harbour, P., and Rosch, T., concurring in part, dissenting in part), *available at* http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf; *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 2, 2007) (final order), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf. The Commission having previously determined that Rambus unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips, the final order (1) prohibits Rambus from making misrepresentations or omissions to standard-setting organizations again in the future and (2) requires Rambus to license its SDRAM and DDR SDRAM technology at specified maximum allowable royalty rates. Rambus has appealed the Commission's rulings to the U.S. Court of Appeals for the District of Columbia Circuit, and briefing is underway, with oral argument yet to be scheduled.

welfare. When a Section 2 violation is found, another significant challenge is creating a remedy that restores competition, but does not go beyond doing just that. The remedy, after all, should not determine market outcomes, stifle innovation, or unduly punish the violator.

The challenge for the FTC in the technology space lies in keeping up and being able to supply adequate guidance to companies and their counselors. The *Rambus* case illustrates just a few of the myriad complex issues under Section 2. There are others, and that is why we recently held 19 days of hearings on the full range of topics regarding Section 2, from the standards of liability in different types of cases, to the remedies used in Section 2 matters. We are working feverishly with the Antitrust Division on a report that we hope will advance thinking in this challenging area.

In yet another effort to stay abreast and contribute to sound policy-making, in June, the Commission released a 165-page report on Broadband Connectivity Competition Policy.[21] We started looking at these issues in earnest during the previous summer, when I realized that the public debate on "net neutrality" was characterized by rhetoric, little of which shed light on the important issues at the core of the dispute. To inform the Commission's work in this area, I formed an Internet Access Task Force in August 2006. Based on what the Task Force learned through its examination of broadband connectivity issues and our experience with antitrust and consumer protection issues more generally, the report recommends that policy makers proceed cautiously in evaluating calls for net neutrality. The report, however, makes clear that the FTC will continue to enforce vigorously the antitrust and consumer protection laws and expend considerable efforts on consumer education, industry guidance, and competition advocacy in the

[21] FTC Staff, *Broadband Connectivity Competition Policy* (June 2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf.

important area of broadband Internet access. Interestingly, for all the hype and, despite our open invitation, we are not hearing actual complaints about anticompetitive conduct.

We have determined that the next project for the Internet Access Task Force is to examine the competition and consumer protection issues raised by the transition from "plain old telephone service" to real-time voice communication over the Internet, commonly called Voice over Internet Protocol or VoIP. VoIP is a technology that allows one to communicate by voice using an Internet connection instead of a regular phone connection, which means a call can be sent along the same packet-switched path as an email rather than over the traditional, circuit-switched telephone network. Thus, any broadband connection – fiber, cable, DSL over copper wire, and now even wireless – can potentially provide voice communication as one more Internet application. The issues surrounding VoIP provide a good opportunity to build on the analysis in our Broadband Report and explore further issues, such as the obligations of competitors to carry each others' data traffic and the effects on consumers and competition of bundling of services. These issues are expected to grow in importance as the convergence of voice, video, and data services breaks down traditional market and regulatory boundaries.

V. Retail and Consumer Goods

Markets for consumer goods have commanded FTC attention, and that focus must remain. Our recent work in the retail sector has included a challenge to an anticompetitive regulation of the Missouri Board of Embalmers and Funeral Directors, a six-member Board established by state law and authorized to adopt and enforce rules and regulations governing and defining the practices of funeral directing and embalming.[22] Without clear authority from the

[22] FTC News Release, *Missouri Funeral Regulators Agree to Settle FTC Antitrust Charges* (Mar. 9, 2007), *available at* http://www.ftc.gov/opa/2007/03/missouriboard.shtm.

state, the Board, which included five funeral directors, promulgated a rule that only a licensed funeral director would be allowed to make arrangements for "the sale or rental to the public of funeral merchandise, services or paraphernalia." The Commission concluded that the regulation restrained competition by severely limiting the ability of non-licensed persons, like big-box and online retailers, to sell caskets, thus depriving consumers of improved choices and the benefits of greater price competition. Under a settlement with the Commission, the Missouri funeral regulators agreed not to issue any similar regulations in the future and to broadly notify the public that sales by non-funeral directors were not prohibited. Much like recent cases we have brought in the real estate brokerage area,[23] it illustrates the changes in even highly traditional markets wrought by new retailing models, and the Internet, and the need to safeguard the ability of innovators to compete.

Our merger work in consumer goods has included a challenge to Rite Aid Corporation's proposed $3.5 billion acquisition of the Brooks and Eckerd pharmacies from Canada's Jean Coutu Group (PJC), Inc., requiring the merged firm to sell 23 pharmacies to preserve the competition that would otherwise be lost in the merger,[24] and a litigated challenge to Whole Foods Market's $670 million acquisition of its chief rival, Wild Oats Markets.

As you know, the district court did not grant the preliminary injunction sought by the FTC. Obviously, this result was disappointing, particularly coming on the heels of another loss. But the courts play an important role in merger enforcement, and whether we win or lose in

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[23] *See, e.g.*, FTC News Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services* (Oct. 12, 2006), *available at* http://www.ftc.gov/opa/2006/10/realestatesweep.shtm.

[24] FTC News Release, *FTC Challenges Rite Aid's Proposed $3.5 Billion Acquisition of Brooks and Eckerd Pharmacies from Canada's Jean Coutu Group, Inc.* (June 4, 2007), *available at* http://www.ftc.gov/opa/2007/06/riteaid.shtm.

court, it is important that we carefully evaluate the courts' decisions, our own analysis, and our evidentiary presentation. We have been debriefing – that is, examining our strengths and our weaknesses both in terms of legal analysis and in litigation performance – and endeavoring to put improvements into place.

Among economists, unilateral effects is a widely accepted theory of competitive harm. Yet both the FTC and DOJ have experienced limited success litigating differentiated product cases under unilateral effects theory.[25] To that end, I am announcing today that the FTC, on February 12, 2008, will host a workshop to discuss the core features and economic bases of unilateral effects theory as applied to mergers. Central to this workshop will be a dialogue about the presumptions drawn from market definition and market share analyses, and the positive and negative consequences of relying on these presumptions to prove liability under unilateral effects theory. Workshop panelists will examine the importance of econometric and non-econometric evidence when relied upon by experts, and how reliance on such evidence may bolster or undermine the credibility of the expert. A panel also will discuss, from the trial attorney's point of view, effective strategies for litigating mergers under unilateral effects theory and the relative importance of presenting business documents, customer testimony, industry experts, and other non-economic market evidence when bringing a unilateral effects case. I encourage everyone to participate in what promises to be an interesting and informative program.

VI. International

[25] Although the Commission found a consummated hospital merger to be illegal because the merger enabled the merged parties to raise prices unilaterally in *Evanston Northwest Healthcare*, federal courts have been hesitant to rule for the government in unilateral effects cases. Notable examples include *Whole Foods*, *Oracle*, and *Sungard*. Even when the government has prevailed under a unilateral effects theory of competitive harm, as in *Staples*, *Swedish Match*, and *Libbey*, courts have not expressly held for the government based on unilateral effects theory.

I want to conclude by touching on a priority that crosses all of our work, and that is international cooperation and convergence. As I detailed in my recent paper for the Fordham Competition Law Institute conference,[26] much has been achieved in a relatively short period of time. Our cooperative relationships with major trading partners are productive; convergence, particularly in the areas of mergers and cartels, is occurring rapidly; and countries like China are adopting new competition regimes. At our sixth annual meeting of the International Competition Network in Moscow last May, the ICN reported a membership of 100 agencies from 88 jurisdictions – not bad for a young organization that began in 2001 with 16 agencies.[27]

I have spent the last six-and-a-half years working to establish cooperative relationships, to achieve convergence or at least coherence, and to provide assistance to new agencies in developing countries. I think it is important to remember that we have come a long way in a short period, but the challenges that remain are enormous. First, developing sound competition policy requires having trust in markets. Without that trust, competition officials will resort to managing markets, which itself infringes on competition. Yet that trust does not develop overnight. Even in the United States, which has seen enormous benefits from competitive markets, legislators and government officials often think they can improve them. Now ask yourself whether those accustomed to state-run economies are likely to trust markets. Where to draw the line between enforcement that weeds out anticompetitive conduct and allows markets to

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[26] Chairman Deborah Platt Majoras, *Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy*, 34th Annual Conference on International Antitrust Law & Policy, Fordham Competition Law Institute (Sept. 27, 2007), *available at* http://www.ftc.gov/speeches/majoras/070927fordham.pdf.

[27] ICN News Release, *International Competition Network, Competition Authorities Agree to Develop Merger and Unilateral Conduct Guidance, Emphasize Co-operation, Outreach, Implementation* (June 1, 2007), *available at* http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2007/06/1/28.

flourish and action that endeavors to manage markets is a question with which competition officials will continue to struggle. The problem is that a little overdeterrence here and a little over there can add up in the global equation to significant reductions in the competition and innovation that we are sworn to protect.

There are many examples. Russia recently recommended lowering dominance thresholds for food commodity companies from 35 to 15 percent. And India has amended its Competition Act to include new merger notification provisions, which include a mandatory premerger filing that may be triggered by transactions without any appreciable effects in India, as well as a 210-day waiting period for transactions meeting the jurisdictional threshold. Although they have not yet taken effect, these provisions could potentially have significant repercussions for multinationals entering into global transactions – whether or not such transactions impact the Indian market.[28] The proposed legislation to exempt independent pharmacies from the U.S. antitrust laws provides an example right here at home.

A second challenge is the constant return to the arms of nationalism that competition policies seem to take. Recently, the European Commission has combated efforts to create national champions in the energy industries in France[29] and in Spain,[30] and in the banking sector

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[28] We plan to continue the constructive dialogue with our Indian counterparts to address our questions and concerns regarding the interpretation and implementation of their newly amended Competition Act. Our General Counsel, Bill Blumenthal, recently visited officials in India to discuss those questions and concerns.

[29] Press Release, European Commission, Mergers: Commission Approves Merger of Gaz de France and Suez, Subject to Conditions (Nov. 14, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1558&format=HTML&aged=1&language=EN&guiLanguage=en.

[30] Commission Decision of 20.12.2006 Relating to a Proceeding Pursuant to Article 21 of Council Regulation (EC) No 139/2004 on the Control of Concentrations Between Undertakings, Case No. COMP/M.4197 - E.ON/Endesa, *available at* http://ec.europa.eu/comm/competition/mergers/cases/additional_data/m4197_art21_20122006_en.pdf; *see*

in Italy[31] and Poland.[32] In the 2002 E.on/Ruhrgas merger, the Bundeskartellamt decision to block the merger as anticompetitive was overridden by Germany's Economics Minister to create a national champion in European energy markets.[33]

Many are highly concerned that China's new Anti-Monopoly law will be used to protect Chinese companies at the expense of foreign rivals. These concerns are heightened by recent statements of a Chinese academic, who has called for economic security reviews of foreign transactions,[34] and the recent release of a report, commissioned by the Shanghai Stock Exchange, that calls for the establishment of a comprehensive national security review system for foreign mergers and acquisitions.[35] The report states that Chinese economic security depends on the international competitiveness of its industries and that China should therefore restrict or ban foreign investment in infant industries, ban foreign investment in strategic industries, and assess

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also Press Release, European Commission, Mergers: Commission Decides that Spanish Measures in Proposed E.ON/Endesa Takeover Violate EC Law (Dec. 20, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1853&format=HTML&aged=0&language=EN&guiLanguage=en.

[31] Press Release, European Commission, Free Movement of Capital: Commission Opens an Infringement Procedure Against Italy on the Issue of Acquisition of Stakes in Domestic Banks (Dec. 14, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1595&format=HTML&aged=1&language=EN&guiLanguage=en.

[32] Press Release, European Commission, Mergers: Commission Launches Procedure Against Poland for Preventing Unicredit/HVB Merger (Mar. 8, 2006), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/277&format=HTML&aged=0&language=EN&guiLanguage=en.

[33] The E.on/Ruhrgas decision is described in Germany's annual report to OECD for 2001-2002, ¶¶ 59-68, *available at* http://www.oecd.org/dataoecd/34/6/2489057.pdf.

[34] International Herald Leader Interview of Cao Jianhai (Sept. 19, 2007), *available in Chinese at* http://news.xinhuanet.com/fortune/2007-09/19/content_6752845.htm.

[35] *See* "The Relevant Overseas Rules on Foreign M&A and Sectoral Success and Issues of Concern in the Process of China's Securities Market," *available in Chinese at* http://finance.sina.cn/stock/t/20070903/02201641255.shtml.

social issues, such as employment layoffs resulting from these transactions, as part of a national economic security review. Nor are we free of these pressures in the United States, where the Chinese company, CNOOC, abandoned its bid for U.S. company Unocal in the face of Congressional opposition, which was based at least in part on energy security concerns.

Another challenge is to remain focused on doing our jobs appropriately for our citizens, without getting caught up in media talk and political pressure. We keep reading that, during the past six-and-two-thirds years, there has been a marked change in the level of antitrust enforcement. On the merger front, the facts show that when one takes account of the number of merger filings,[36] there has been no less enforcement activity over the past several years. And, on the conduct side, from June 2001 through 2006, the FTC prosecuted five cases involving improper actions by dominant firms. You have to go back to the period from 1971 to 1976 to find a comparable period in which the FTC brought a larger number of cases involving dominant firm conduct.

We could, nevertheless, engage in an arms race based on which jurisdiction can bring the most cases – the type of race that media and others seem to enjoy fostering. I was stunned, for example, when reading a recent complaint that argued not only that we should take action based on the evidence, but because other jurisdictions were already doing it, and we should do it, too, to maintain U.S. leadership in the field.

Far be it from me to ever suggest that healthy competition, even between agencies, cannot have a positive effect. And certainly comparisons across jurisdictions and enforcement approaches have much to teach. But as with all competitions, the value in "winning" lies in the

[36] The late 1990s saw a huge number of merger filings – 4,800 in 2000, compared with a low of 968 in 2003, climbing back to not quite 2000 this year.

measurement. In the business of antitrust enforcement, being on the "winning" team must mean ensuring the integrity of markets through solid enforcement actions and transparent policies, such that innovation and competition thrive. If, however, "winning" is defined as the victor in an "arms race" in which the measurement of success lies in bringing the most high-profile cases, that is a dangerous game. When it comes to intervening in markets, increased output is not always optimal. If we must measure victory, we should do it according to the competitiveness of our markets and the consequent innovation and productivity. As long as I am here, we will exercise U.S. leadership by bringing sound enforcement actions based on evidence of anticompetitive action, period.

Thank you.