100 IS THE NEW 30: RECOMMENDATIONS FOR THE FTC'S NEXT 100 YEARS

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INTRODUCTION

Looking back on my twenty-plus-year career as a lawyer, I can see that several institutions have greatly influenced my path, from my field of practice (antitrust and consumer protection law), to where I practice (primarily government service), to how I approach my responsibilities as a government official. George Mason University School of Law ("GMUSL") is where I learned about antitrust, as well as the proper goals of economic regulation, such as the rules that protect consumers from fraud and deception. At the U.S. Court of Appeals for the D.C. Circuit, as a staff attorney and then a law clerk to a judge, I learned about how a collegial deliberative body should operate. Finally, at the Federal Trade Commission ("FTC"), I put that learning into practice, starting as an attorney in the Office of General Counsel, serving as an attorney advisor to a commissioner, heading the Office of Policy Planning, and now as a commissioner myself. Thus, as the FTC marks its centennial this year, I was very honored to participate in the *George Mason Law Review* and the Law & Economics Center at GMUSL symposium on "The FTC: 100 Years of Antitrust and Competition Policy" ("Symposium").

The lively discussions at the Symposium showed that the FTC is still dynamic and effective in pursuit of its core mission to promote competition and protect consumers, displaying great energy and flexibility in its work. The Symposium also demonstrated GMUSL's continuing interest in how best to safeguard consumer welfare through institutions that protect competitive market forces. The support shown for the FTC's core mission and institutional structure does not mean there is no room for improvement, however. I have thus entitled this article "100 is the New 30: Recommendations for the FTC's Next 100 Years." Based on my long involvement in seeking to promote competition and advance consumer welfare through the FTC's institutional capabilities, I take this opportunity to offer a framework for evaluating the agency's performance as well as recommendations for improving the FTC's work in the future.

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In 2008, then-Chairman Bill Kovacic asked me to oversee an agency self-assessment in anticipation of the Commission's centennial in 2014. The report of that self-assessment—"The Federal Trade Commission at 100: Into Our 2nd Century"[1] ("FTC at 100 Report")—was an effort to create a framework for assessing the Commission's performance and to identify where and how the agency may improve as it moves into its second century. At my official swearing-in as an FTC Commissioner in April 2012, I invoked the FTC at 100 Report as a guide for my work as a commissioner.[2] In fact, many of the views I have expressed and positions I have taken since becoming a commissioner reflect my efforts to put into action the underlying principles and philosophy of the FTC at 100 Report.

As the FTC turns one hundred years old this year, we should use this opportunity not simply 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 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 Report, 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.

I. USE ALL OF OUR MANY AVAILABLE TOOLS

Both during and since his time as chairman, Timothy J. Muris touted the many different tools in the FTC arsenal.[3] At the Symposium, Chairman Muris took the opportunity to make the case again for the agency to use those many tools.[4] During my time as a commissioner, I have been a strong advocate for the FTC's use of 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

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1 WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY (2009) [hereinafter FTC AT 100 REPORT], *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf.

2 *See* Remarks of Maureen K. Ohlhausen on the Occasion of Her Swearing-in as Commissioner, Federal Trade Commission (Apr. 16, 2012), http://www.ftc.gov/sites/default/files/documents/public_statements/remarks-maureen-k.ohlhausen/120416ohlhausenswearingin.pdf.

3 *See, e.g.*, Timothy J. Muris, Chairman, Fed. Trade Comm'n, Keynote Panel at the George Mason Law Review and Law & Economics Center Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014), http://vimeo.com/86788315.

4 *Id.*

business education. Also, letting self-regulation work, or encouraging industry best practices, may be the best tool to deploy in certain circumstances. Sometimes the FTC may not be the right actor to address an issue, and the market or another part of government is better suited to address the problem. In short, our yardstick for success must be whether we make consumers better off, not simply whether we file a large number of enforcement actions.

The FTC has a significant policy role to play in the competition space using its non-enforcement tools, and I will briefly highlight two tools that we can and do use in furtherance of our policy mission. The first tool is our authority under Section 6(b) of the FTC Act, which allows us to obtain information under compulsory process from market participants and pursue a study of a particular competition (or consumer protection) issue.[5] One of the most significant areas being debated today in the antitrust bar is the proper treatment of intellectual property ("IP"). At the Symposium, a panel on "Intellectual Property and Antitrust" addressed the antitrust implications of seeking injunctions on standard-essential patents ("SEPs") encumbered by fair, reasonable, and non-discriminatory licensing commitments, as well as competition issues raised by certain activities of patent assertion entities.[6]

The intersection of IP and competition law is a particularly compelling area for in-depth exploration by the FTC under its 6(b) authority and other policy tools. As we announced in September of 2013, the FTC plans to perform such a study of the impact of patent assertion entity ("PAE") activity on competition and innovation.[7] This study should provide a better understanding of the activity of PAEs and its various costs and benefits.[8] The agency plans to address questions regarding PAEs that others have been unable to answer thus far, including:

(1) How do PAEs organize their corporate legal structure, including parent and subsidiary entities?

(2) What types of patents do PAEs hold, and how do they organize their holdings?

(3) How do PAEs acquire patents, and how do they compensate prior patent owners?

(4) How do PAEs engage in assertion activity, such as demand, litigation, and licensing behavior?

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5 15 U.S.C. § 46(b) (2006).

6 Intellectual Property and Antitrust Panel at the George Mason Law Review and Law & Economics Center Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014), http://vimeo.com/86799859.

7 *See* Press Release, Fed. Trade Comm'n, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 27, 2013), http://www.ftc.gov/opa/2013/09/paestudy.shtm.

8 *Id.*

(5) What does assertion activity cost PAEs?
(6) What do PAEs earn through assertion activity?[9]

This study will likely be the most comprehensive and in-depth analysis of these issues, with more than twenty-five PAEs operating across a variety of industries likely to receive information requests.[10] We also are planning a benchmarking exercise in which we will be sending out information requests to another fifteen entities that assert patents.[11] 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 patent rights.[12]

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 ("OPP"), which oversees the agency's competition and consumer advocacy efforts. Now, as a commissioner, I continue to support the FTC's work in advocating for procompetitive policies.

At the Symposium, the FTC's advocacy efforts were a focus of the panel on "State and Professional Restraints."[13] Former OPP Director (and current GMUSL law professor) Todd Zywicki discussed the cost-effective nature of the FTC's advocacy program, which he described as comprising a very small portion of the agency's budget, but able to head off potentially significant competitive problems in the marketplace before they develop and take hold.[14] FTC Commissioner Julie Brill identified another benefit from the FTC's advocacy efforts: identifying competitive issues arising from proposed state legislation driven by consumer protection concerns.[15]

Professor Zywicki also noted in his panel remarks that the state action doctrine under *Parker v. Brown*[16] precludes the FTC from challenging anticompetitive state restrictions once they are enacted into law, thus making advocacy opposing the enactment of such restrictions all the more important.[17] The FTC's advocacy program, however, has also addressed the scope of the state action doctrine in amicus filings and through enforcement actions intended to narrow the scope of the doctrine. The FTC's recent ap-

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9 *Id.*

10 *See id.*

11 *Id.*

12 *Id.*

13 State and Professional Restraints Panel at the George Mason Law Review and Law & Economics Center Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014) [hereinafter State and Professional Restraints Panel], http://vimeo.com/86788314.

14 *Id.* at 1:06:50 (remarks of Todd J. Zywicki).

15 *Id.* at 29:15 (remarks of Commissioner Julie Brill).

16 317 U.S. 341 (1943).

17 State and Professional Restraints Panel, *supra* note 14, at 1:03:45 (remarks of Todd. J. Zywicki).

pellate successes in *FTC v. Phoebe Putney Health Systems, Inc.*[18] and *North Carolina State Board of Dental Examiners v. FTC*[19] can be traced directly back to the State Action Task Force (of which I was a member), which former Chairman Muris established in the early 2000s with the goal of convincing the courts to narrow their reading of the state action doctrine.[20]

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 program.

II. STAY FOCUSED ON OUR CORE COMPETENCY

My second recommendation for the FTC's next century is for the agency to stay focused on its 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.

A. *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, the Commission can conduct competition policy R&D (by, for example, holding workshops and issuing reports) to assess the economic impact of a particular business practice and, if warranted, challenge such practice in an administrative trial and potentially issue a Commission opinion to explain why such practice violates the antitrust laws. Using the agency's unique collection of administrative and policy tools 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* and the Fourth Circuit decision in *North Carolina Dental*, each of which, as noted above, clarified the

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18 133 S. Ct. 1003 (2013).

19 717 F.3d 359 (4th Cir. 2013), *appeal dismissed from* N.C. Bd. of Dental Exam'rs, FTC Docket No. 9343 (Feb. 2, 2011) (opinion of the Commission), http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf.

20 *See* FED. TRADE COMM'N, REPORT OF THE STATE ACTION TASK FORCE (2003), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf.

proper scope of the state action doctrine.[21] Other valuable contributions to the development of the antitrust laws include the Commission's *In re Union Oil Co. of California*[22] opinion in the *Noerr-Pennington* area; the Commission's *In re PolyGram Holding, Inc.*,[23] and *In re Realcomp II, Ltd.*[24] opinions in the joint conduct area; and the Commission's *In re Rambus, Inc.*[25] opinion in the monopolization area. Most recently, the Commission addressed another complex area of monopolization law—exclusive dealing—in its decision in the *In re McWane, Inc.*[26] administrative litigation. There, the Commission held that McWane, Inc., the largest U.S. supplier of ductile iron pipe fittings used in municipal and water distribution systems, maintained its monopoly over such fittings through an unlawful exclusive dealing policy.[27]

In sum, the FTC has contributed significantly to developing the antitrust laws through its unique policy and research tools as well as its administrative litigation capability. Going forward, the Commission should measure its success by looking at how it may continue to make valuable contributions to the antitrust laws.

B. *Clarify the Scope of the FTC's UMC Authority Before Invoking It*

There has been an ongoing discussion about the scope of the agency's authority under Section 5 of the FTC Act to prevent unfair methods of competition. In fact, the Symposium opened with a keynote address by FTC Chairwoman Edith Ramirez focused on Section 5.[28] In the keynote, Chairwoman Ramirez conveyed her view that, rather than issuing a policy statement on the FTC's standalone Section 5 authority, as many have called for, the agency should develop Section 5 through a common law approach.[29] The chairwoman based her recommendation in part on her preference for

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21 *See supra* notes 18-19 and accompanying text.

22 138 F.T.C. 1 (2004).

23 136 F.T.C. 310 (2003), *appeal dismissed*, PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

24 FTC Docket No. 9320 (Oct. 30, 2009), http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf (opinion of the Commission), *appeal dismissed*, Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011).

25 FTC Docket No. 9302 (Aug. 6, 2006), http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf (opinion of the Commission), *rev'd*, Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

26 FTC Docket No. 9351 (Feb. 6, 2014), http://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf (opinion of the Commission).

27 *Id.* at 20. The Commission dismissed the remaining six counts alleged by staff in their complaint. *See id.* at 2.

28 Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Opening Keynote Address at the George Mason Law Review and Law & Economics Center Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014), http://vimeo.com/86788312.

29 *Id.* at 15:55.

the flexibility that a common law approach would offer over the certainty that would come with a Commission policy statement on its use of Section 5.[30] The chairwoman further explained that the FTC's recent consents in *In re Motorola Mobility LLC*[31] and *In re Bosley, Inc.*[32] make it clear that the Commission will pursue standalone Section 5 cases where the likely competitive harm outweighs the cognizable efficiencies.[33]

The Symposium not only started with Section 5 but also concluded with a final panel on "Section 5 Policy."[34] This panel explored the need for, and potential outlines of, a Commission policy statement on Section 5 and included a lively debate of the issues among Commissioner Joshua Wright and the other panelists.[35] At the panel, Commissioner Wright repeated his call for a Commission policy statement on Section 5, which would permit its use only against conduct that significantly harms competition and for which there is no procompetitive justification.[36]

Although I believe the FTC should devote its efforts to improving the antitrust laws, should the agency wish to bring cases based on its UMC authority, I believe the principles of transparency and predictability demand that the Commission first provide guidance on the scope of this authority through a policy statement. Accordingly, I presented my views on the proper scope of Section 5 last summer in a speech before the U.S. Chamber of Commerce.[37]

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30 *Id.* at 18:00.

31 FTC File No. 121-0120 (Jan. 3, 2013), http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolado.pdf (decision and order).

32 FTC File No. 121-0184 (Apr. 8, 2013), http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130408bosleydo.pdf (decision and order).

33 Ramirez, *supra* note 28, at 21:00.

34 Section 5 Policy Panel at the George Mason Law Review and Law & Economics Center Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy (Feb. 13, 2014), http://vimeo.com/86792643.

35 *Id.*

36 *See id.*; *see also* Statement of Commissioner Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013), http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf.

37 *See* Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *Section 5: Principles of Navigation*, Remarks before the U.S. Chamber of Commerce (July 25, 2013) [hereinafter Ohlhausen, Remarks before Commerce], *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf; *see also* Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1 (2013), *available at* http://www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf.

Generally speaking, as I stated in my dissent in the November 2012 *In re Robert Bosch GmbH*[38] matter, I believe that we should proceed under a philosophy of "regulatory humility."[39] More specifically, in my Section 5 speech, I offered for thought and discussion six factors that should guide the FTC whenever it reviews conduct beyond the reach of the antitrust laws.[40] First, the FTC's UMC authority should be used solely to address substantial harm to competition or the competitive process, and thus to consumers.[41] We should refrain from attempting to use Section 5 for policing non-competition violations or achieving social goals. Nor should we use Section 5 to protect individual competitors.

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.[42]

Third, in using our UMC authority, the FTC should avoid or minimize conflict with the Department of Justice and other agencies.[43] We also should always ask whether the FTC is the right agency to address the issue of concern. 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.[44] 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.[45] 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.[46]

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38 FTC File No. 121-0081 (Nov. 26, 2012), http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/121126boschohlhausenstatement.pdf (statement of Commissioner Maureen K. Ohlhausen).

39 *See* Robert Bosch GmbH, FTC File No. 121-0081, at 2 (Nov. 26, 2012) [hereinafter Ohlhausen Bosch Dissent], http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/121126boschohlhausenstatement.pdf (statement of Commissioner Maureen K. Ohlhausen) ("[T]his enforcement policy appears to lack regulatory humility. The policy implies that our judgment on the availability of injunctive relief on FRAND-encumbered SEPs is superior to that of these other institutions.").

40 Ohlhausen, Remarks before Commerce, *supra* note 37, at 7.

41 *Id.*

42 *Id.* at 7-8.

43 *Id.* at 8.

44 *Id.*

45 *Id.*

46 Ohlhausen, Remarks before Commerce, *supra* note 37, at 8.

To conclude this recommendation, as I indicated in my Section 5 speech, I believe a policy statement on our UMC authority is necessary if the FTC defines such authority expansively.[47] 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.

III. PROMOTE AGENCY TRANSPARENCY AND PREDICTABILITY

My final recommendation for the FTC's next century—and, of course, I reserve the right to add to this list at least through my term as a commissioner—is for the agency to be as transparent and predictable as possible. As I discussed earlier, transparency and predictability are crucial to maintaining support for the FTC's mission.

There have been a few matters during my current stint on the Commission in which I believe we have fallen short on these two important measures. First, in July 2012, I opposed the Commission's withdrawal of its 2003 policy statement on seeking disgorgement in competition cases.[48] I expressed concern that by "moving from clear guidance on disgorgement to virtually no guidance on this important policy issue" we were leaving those subject to our jurisdiction without sufficient guidance about the circumstances in which the FTC will pursue the remedy of disgorgement in antitrust matters.[49]

I next raised concerns about transparency and predictability in the *Bosch*[50] and *Motorola Mobility*[51] matters, which involved fair, reasonable, and non-discriminatory ("FRAND") licensing commitments made on 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.[52] In addition to con-

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47 *Id.* at 1.

48 *See* Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases, at 1-2 (July 31, 2012), http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf.

49 *Id.* at 2.

50 Robert Bosch GmbH, FTC File No. 121-0081 (Apr. 24, 2013), http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf (decision and order) (requiring Bosch, first, to agree not to seek injunctions on its SEPs against parties that are willing to license such patents, and, second, to license those patents on a royalty-free basis).

51 Motorola Mobility LLC, FTC File No. 121-0120 (Jan. 3, 2013), http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolado.pdf (decision and order) (imposing a multi-step process that Google must go through before it is permitted to seek injunctive relief on its SEPs).

52 *See* Ohlhausen Bosch Dissent, *supra* note 38, at 3 ("[B]efore invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude),

cerns about the lack of guidance on our UMC authority, I also argued that when we rely on Section 5, which only the FTC enforces, rather than the antitrust laws, which both the FTC and the Justice Department enforce, we risk creating two different standards for patent holders depending on which agency happens to review the alleged misconduct.[53] These conflicts, whether real or perceived, create confusion in the market and undermine predictability for market participants who hold or use SEPs.

In contrast to the withdrawal of the disgorgement policy statement and the two SEPs matters, in my view, the FTC has offered significant transparency and predictability in the merger review context. One of the most useful means for providing such transparency and predictability is the issuance of closing statements in significant investigations that the Commission ultimately closes without taking any action. Whether they are issued by the Commission or the Bureau of Competition Director, these statements offer important insights 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.[54] 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.[55] The Commission described differences in the competition faced by office supply superstores in 1997 and today.[56] 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.[57] 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.[58] As an aside, I would note that agency

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the Commission should fully articulate its views about what constitutes an unfair method of competition . . . ."); Motorola Mobility LLC, FTC File No. 121-0120, at 5 (Jan. 3, 2013), http://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-0 (dissenting statement of Commissioner Maureen K. Ohlhausen) ("I disagree with my colleagues about whether the alleged conduct violates Section 5 but, more importantly, believe the Commission's actions fail to provide meaningful limiting principles regarding what is a Section 5 violation in the standard-setting context, as evidenced by its shifting positions in *N-Data*, *Bosch*, and this matter.").

53 *See* Ohlhausen Bosch Dissent, *supra* note 38, at 1.

54 *See* Office Depot, Inc., FTC File No. 131-0104 (Nov. 1, 2013), http://www.ftc.gov/sites/default/files/documents/closing_letters/office-depot-inc./officemax-inc./131101officedepotofficemax statement.pdf (statement of the Commission); Press Release, Fed. Trade Comm'n, FTC Closes Seven-month Investigation of Proposed Office Depot/Office Max Merger (Nov. 1, 2013), http://www.ftc.gov/news-events/press-releases/2013/11/ftc-closes-seven-month-investigation-proposed-office.

55 *Office Depot*, FTC File No. 131-0104, at 1.

56 *Id.*

57 *Id.*

58 *Id.*

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.

Transparency and predictability are important principles that should also guide the agency's efforts on the consumer protection side. An important component of such transparency and predictability is honoring our previously issued policy statements. In the advertising substantiation area, however, I have seen the beginning of a problematic retreat from our historical enforcement policy in this area. The FTC's Advertising Substantiation Policy Statement[59] dates back to 1984, and follows the doctrine first announced in the Commission's 1972 decision in *In re Pfizer, Inc.*[60] The statement sets forth the requirement that advertisers must have a reasonable basis for making objective claims before the claims are disseminated.[61] Additionally, advertisers must possess at least the level of substantiation expressly or impliedly claimed in the advertisement; thus, if an advertisement makes an express claim, such as "tests prove," "doctors recommend," or "studies show," the substantiation must, at a minimum, reflect that standard.[62] This policy statement has stood the test of time and proved to be an invaluable tool to the agency in assessing advertising claims. Equally important, it has provided guidance to industry on the types of truthful, nondeceptive claims that can be made for products or services.

One of the goals of the *Pfizer* analysis is to balance the value of greater certainty of information about a product's claimed attributes with the risks of both the product itself and the suppression of potentially useful information about it.[63] Under such an analysis, the burden for substantiation for health- or disease-related claims involving a safe product, such as a food, should be lower because the risks to consumers from using the product are typically lower.

Recent Commission orders, however, seem to have adopted two random controlled trials ("RCTs") as a standard requirement for health- and disease-related claims for a wide array of products. For example, in *In re POM Wonderful LLC*,[64] the majority determined that claims that purport to "treat, prevent or reduce the risk of heart disease, prostate cancer, and [erectile dysfunction] must be substantiated with [at least two] RCTs."[65] The majority's intent was for these studies to be a proxy for proof of causation;

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59 Thompson Med. Co., Inc., 104 F.T.C. 648, 839 appx. (1984) (FTC policy statement regarding advertising substantiation).

60 81 F.T.C. 23 (1972).

61 *Thompson Med. Co.*, 104 F.T.C. at 839 (FTC policy statement).

62 *Id.* (internal quotation marks omitted).

63 *See id.*

64 FTC Docket. No. 9344, at 35, 51 (Jan. 10, 2013), http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130116pomopinion.pdf (opinion of the Commission)

65 *Id.* at 35.

that is, they indicate that the product actually treats the disease.[66] Further, in a number of recent settlements, the FTC has included the requirement of two RCTs in its consent orders.[67]

Requiring RCTs may be appropriate in some circumstances where use of a product carries some significant risk, or where the costs of conducting RCTs may be relatively low, such as for weight loss or for other conditions whose development or amelioration can be observed over a short time period. My concern is that, given the expectation created by this series of orders that two RCTs will be required to substantiate any health- or disease-related claims for many relatively safe products, it seems likely that producers may forgo making such claims about products, even if they may otherwise be adequately supported by non-RCT evidence. For example, millions of consumers follow the advice that potassium is especially important for pregnant women, and that eating a high-fiber, whole-grain diet is good for you. That is very helpful information, but it has not been proven at the two RCT standard level of substantiation. If the Commission demands too high a level of substantiation in pursuit of certainty, it risks losing the benefits to consumers of having access to information about emerging areas of science and the corresponding pressure on firms to compete on the health features of their products.[68]

At the Symposium, Tim Muris echoed these concerns, arguing that the Commission has lost its way on advertising regulation.[69] Muris noted that one of the most important things that Jim Miller did as FTC chairman was to defend Kellogg's during the 1980s, when the Food and Drug Administration threatened to shut down its claims that high-fiber cereals helped reduce

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66 *Id.* at 35-36 ("[D]isease claims require proof of causation. . . . [A]nd as demonstrated by the weight of expert testimony in this case, proof of causation requires RCTs.").

67 *See, e.g.*, GeneLink, Inc., FTC File No. 112-3095, at 4 (Jan. 7, 2014), http://www.ftc.gov/sites/default/files/documents/cases/140107genelinkorder.pdf (agreement containing consent order) (where respondent claimed their nutritional supplements treated or mitigated diabetes, heart disease, arthritis, and insomnia, the Commission required "at least two adequate and well-controlled human clinical studies . . . conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true" for GeneLink to claim its products were effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease); L'Occitane, Inc., FTC File No. 122-3115, at 3 (Jan. 7, 2014), http://www.ftc.gov/sites/default/files/documents/cases/140107loccitaneorder.pdf (agreement containing consent order) (requiring two RCTs, but limiting the requirement to weight-loss claims).

68 *See* GeneLink, Inc., FTC File No. 112-3095, at 2 (Jan. 7, 2014), http://www.ftc.gov/sites/default/files/documents/public_statements/statement-comissioner-maureen-k.ohlhausen-dissenting-part-concurring-part/140107genelink-mko.pdf (statement of Commissioner Maureen K. Ohlhausen dissenting in part and concurring in part).

69 Muris, *supra* note 3, at 48:18 (citing J. Howard Beales III et al., *In Defense of the* Pfizer *Factors* (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 12-49, 2012), *available at* http://www.law.gmu.edu/assets/files/publications/working_papers/1249InDefenseofPfizer.pdf).

the risk of cancer.[70] Muris's view is that the FTC's current policy on advertising substantiation would not allow such beneficial claims.[71]

CONCLUSION

The GMUSL Symposium was a success by any measure and marked the first of several programs this year that will address and debate FTC competition and consumer protection policy—past, present, and future. I look forward to a lively discussion of FTC policy over the next hundred years, both within the agency with my commissioner colleagues and agency staff, as well as with the agency's many important stakeholders.

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70 *Id.* at 48:30.

71 *Id.* at 48:50.