JANUARY 2009, RELEASE TWO

GCP
THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

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Within a short time, President Obama will select the new Chairman of the Federal Trade Commission ("FTC"). This will be an important decision in many respects— the FTC is the leading federal enforcer of competition and consumer protection laws. Because the FTC has no specific industry jurisdiction, it can bring its expertise to bear in numerous markets; as an independent agency it has a greater degree of independence than does the Department of Justice ("DOJ"). And its combined consumer protection and competition expertise permits it to create a unified enforcement agenda to protect competition and consumers. Not surprisingly, the single most admired regulatory achievement of the Bush Administration—the 'Do Not Call' list—was initiated and directed by the FTC.

The Chairman of the FTC has numerous assets at its disposal. The Commission is well respected by companies and consumers alike. And Congress has acknowledged its achievements.

But at the same time, the new Chairman faces unprecedented challenges, as the entire government does. The economic downturn makes competition enforcement even

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more vital, as consumers have suffered from higher prices and fewer services in concentrated markets.

First, the state of antitrust jurisprudence is uncertain. The courts increasingly have narrowed the interpretation of the Sherman Act, creating greater procedural burdens and limiting liability. A century ago a similar cramped approach by the courts led progressive thinkers such as Presidents Roosevelt and Wilson to call for the creation of a specialized competition authority. Indeed, the failure of the Sherman Act was a hot political issue in the election of 1912. One of the earliest initiatives of the Wilson Administration was the enactment of the Federal Trade Commission Act and the establishment of the FTC.

Second, the standards that apply to dominant firms have been weakened by a lack of DOJ enforcement. Bush Administration antitrust enforcers at the DOJ articulated a vision that "monopoly is good" and monopolists should be applauded for securing monopoly profits. Not surprisingly they brought no enforcement actions against anticompetitive conduct by dominant firms, a remarkable reversal considering the DOJ's substantial enforcement against firms like Microsoft, American Airlines, Visa and MasterCard during the Clinton Administration. Some courts have joined the chorus and have articulated even laxer antitrust rules for monopolists. Unfortunately, dominant firms typically do not spur economic growth—rather it is competitive rivalry that leads to better products, greater innovation, more jobs, and lower prices for consumers.

Third, there is an unprecedented level of cartel enforcement suggesting that

corporate compliance with the antitrust laws continues to be a secondary consideration—even for sophisticated multinational corporations. Similarly, lax merger enforcement has permitted numerous markets to become more concentrated, often leading to higher prices, less service, and dampened innovation.

Fourth, the assumptions behind non-intervention by the government—that markets work, regulation is a poor substitute for market forces and those markets correct themselves—are increasingly the subject of doubt. Experience with the broad regulatory failure in securities and financial service markets, among other failures, suggests that a benign view of market correction may be remarkably naïve. In other words, antitrust enforcers need to rethink whether regulation may be the right solution.

Finally, the FTC faces new threats to its jurisdiction and powers. The FTC has appropriately attempted to strengthen the process of merger litigation. In doing so, the FTC has adopted procedures that differ from those of the DOJ. These changes have faced considerable criticism from commentators who question whether the two agencies should take different approaches, and the revised FTC approach will face scrutiny in the next Congress.

How, then, can the new Chairman of the FTC address these new challenges?

## I. UTILIZE THE BROAD RANGE OF POWERS OF THE FTC

The FTC and the Antitrust Division of the Department of Justice share antitrust jurisdiction and they effectively compete for primacy as the chief federal antitrust enforcer. Over time, many commentators, including leading Democrats, have suggested

that differences between the two agencies are counterproductive because there should not be inconsistent approaches to different industries depending upon which agency has jurisdiction. Of course, this difference exists among a number of regulatory agencies. But, more importantly, this view overlooks the purpose of Congress in establishing a separate independent agency for competition and consumer protection enforcement.

The FTC was born at a time of great dissatisfaction with antitrust enforcement in the federal courts, and was intended to be a very different agency from its older colleague. The vision and goal for the FTC was to create an expert body devoted to competition issues that might not be effectively addressed through enforcement by generalist federal courts. Congress intended the FTC to serve as a uniquely effective vehicle for advancing the development of antitrust law in complex settings in which the agency's expertise can make a measurable difference.

The promise of the unique role of the FTC has been realized only in part. In a seminal speech given near the beginning of the Kennedy Administration, FTC Commissioner Philip Elman articulated a vision for how the FTC fit into the Congressional scheme for federal antitrust enforcement. He explained that the Congress that enacted the FTC Act intended the Commission to supplement, not duplicate, the work of the Antitrust Division and private antitrust enforcement. The Commission, unlike the federal judiciary, is "a single tribunal whose only duty is trade regulation," and is intended "to make reliable, predictive judgments regarding the competitive effects of questioned business conduct." Yet, he observed that "conventional case-by-case litigation

in the courts" continued to be the principal method of antitrust enforcement, "even in the gray problem areas where novel and difficult questions of law and policy are presented" and require analysis of complex economic facts. Elman urged the Commission use its distinct powers of gathering information and unique expertise to address complex economic questions that would enhance the development of antitrust law.

What are some of the unique powers the new Chairman should focus on?

- conducting industry studies and issuing reports to Congress,
- enacting trade regulation rules,
- performing studies of past enforcement or non-enforcement actions, and
- conducting hearings and workshops.

### *A. STUDIES AND REPORTS*

There are numerous issues which are not susceptible to specific enforcement actions. In some cases, either regulatory or legislative action is necessary. The Commission has the unique power to use compulsory process to secure information to study the industry competitive impact of various practices. In the Bush Administration, this power was used to issue a seminal report on generic drug competition that led to needed reforms of the Hatch-Waxman Act.

### *B. Trade Regulation Rules*

Congress gave the Commission a unique power to address competitive problems on a more general basis via rulemaking. Section 18 of the FTC Act authorizes the FTC to issue "rules which define with specificity acts or practices which are unfair or deceptive

acts or practices in or affecting commerce" within the meaning of Section 5. The FTC may use this power to fashion suitable remedies to address industry-wide competition and consumer protection issues. This power has been entirely underutilized in the recent past. The Commission has brought critical enforcement actions that have sought to address important problems involving pharmaceutical patent settlements and standard setting. Unfortunately these enforcement actions have not succeeded, in part because of the facts of the individual cases. Perhaps a more effective approach for the next Administration will be to address these issues through trade regulation rules.

Rulemaking may be more effective than case-by-case adjudication. Rulemaking can be tailored in a more precise and careful fashion. Rulemaking does not attempt to find specific firms liable for their past behavior and reduces the likelihood that an enforcement action leads to significant treble damage liability. Finally, rulemaking may be a more efficient way to address competitive problems that are fairly pervasive within a particular market. The Commission's burden in showing a violation of a rulemaking order is a relatively modest one and does not require that the Commission demonstrate that a particular defendant's conduct was unlawful.

### *C. Studies of Past Enforcement Actions.*

Although the FTC may perceive itself as a litigator, what it basically does is regulate. The vast majority of its enforcement actions involve restructuring mergers, which is done through the issuance of a consent order in each matter. In 1998, the FTC issued a thoughtful study of its merger remedies, which led to important reforms of the

merger remedy process. The 1998 study found that a large portion of merger divestitures are unsuccessful. Without an updated study the Commission has little basis, if any, to suggest whether the tremendous resources devoted to merger enforcement benefit consumers. Updating that study is long overdue.

In addition, the FTC should study past non-enforcement actions. This would be particularly helpful for mergers in which the FTC chose not to bring an enforcement action. Through these studies the FTC can assess whether its prediction that a merger would not be harmful is correct.

### *D. Hearings and Workshops.*

Certain issues can be best addressed by providing a public forum for general discussion and analysis. The FTC has held several recent hearings primarily in health care and intellectual property issues. The recent abundant regulatory failures suggests a significant need to address the role of regulation as Congress increasingly turns to new approaches to regulation.

## II. FOCUS ENFORCEMENT ON THE AREAS WITH THE GREATEST ECONOMIC IMPACT.

Any agency has wide discretion in its choice of potential enforcement actions. Often agencies focus on the types of cases that lead to easy resolution because their performance evaluation is based on the number of enforcement actions. Government investigations are expensive and time consuming and often firms without substantial resources may choose to settle an investigation they cannot afford to defend – regardless

of the merits of their defense. This was a particular problem at the FTC during the 1960s, when it brought hundreds of Robinson-Patman cases against small firms – cases that had little-to-no benefit for consumers. But the small respondents in these matters could not afford a protracted battle with the FTC.

It is critical for enforcement agencies like the FTC to focus on those areas with the greatest impact on consumers and competition. One example is the change in pharmaceutical enforcement in the Clinton Administration. Prior to that Administration, FTC pharmaceutical enforcement focused almost entirely on attacking conduct by community pharmacists regarding bargaining with managed care. Although that conduct, if illegal, may have raised the cost of dispensing a prescription by a dollar or two, that harm was miniscule to the harm from branded companies in delaying generic pharmaceuticals from the market. One of the greatest achievements of the Clinton-era FTC was redirecting pharmaceutical enforcement efforts to this anticompetitive conduct that delayed generic competition. The several actions brought both by Clinton and Bush FTC enforcers have yielded hundreds of millions of dollars of benefits to consumers, significantly reducing health care costs.

The next Administration must ramp up pharmaceutical antitrust enforcement even more. As the FTC has challenged practices of brand-name firms to delay generic entry, those firms have developed new delay strategies. Some of these strategies include so-called product changes close to the end of patent life, questionable citizen petitions, sponsoring authorized generics, and proposing state legislation to prohibit automatic

generic substitution. Careful scrutiny of those practices is essential to the Administration's efforts to control health care costs. Generic drugs cost about 70 percent less than their branded equivalents. Over $70 billion of drugs will go off patent the next three years and if these strategies are successful, the ability of generic competition to lower drug prices will be stifled. Consumers will pay billions more.

One area warranting readjustment of priorities involves enforcement actions against health care providers. All of the current health care reform proposals attempt to grapple with the increasing shortages of physicians, especially in rural areas. Yet the Bush Administration spent a disproportionate amount of resources on physicians—bringing 31 cases. Like the efforts against pharmacies in the early 1990s, these cases may have resulted in many enforcement actions without much benefit to consumers or impact in the market. In contrast, the Bush Administration brought no cases challenging anticompetitive conduct against insurance companies or pharmacy benefit managers. The new Administration should return to the more balanced approach of the Clinton Administration. As the American Antitrust Institute observed in its transition team report,"[t]he priorities of the health care enforcement agenda need to be realigned with a greater focus on health insurers, Pharmacy Benefit Management companies ("PBMs"), Group Purchasing Organizations ("GPOs"), and hospitals."

## III. FULLY UTILIZE ADMINISTRATIVE LITIGATION

Unlike the Justice Department, the FTC can litigate cases administratively before its own Administrative Law Judges ("ALJs"). The promise of administrative litigation is

substantial. There is an increasing sense that many types of antitrust cases may be too complex for generalist antitrust judges. Moreover, because the ALJs are dedicated to the agency there is an opportunity to adjudicate decisions before an expert body with substantial expertise in antitrust and economic policy. Finally, the administrative process has the potential to be much more prompt and efficient than federal court litigation. Just to give an example, in one patent settlement case in which federal litigation has been ongoing for over 7 years without any current prospect of trial, the FTC conducted a full trial and reached a decision in 3 years.

In the Clinton Administration, administrative litigation was used to a modest extent, with only 5 significant cases filed. That number more than doubled in the Bush Administration.

Some of the more significant accomplishments of administrative litigation include:

- challenging consummated mergers (*Chicago Bridge, Aspentech, and MSC*), which secured far more meaningful relief than if the agency entered into a non-litigated settlement and probably strengthened the ability to secure far more meaningful relief in other consummated mergers by being able to *credibly threaten* to litigate;
- clarifying merger law and joint venture law in the appellate courts (*Chicago Bridge*, *NTSP*, and *Three Tenors*);
- securing relief that probably benefited consumers for over $500 million

annually in a single case (*Unocal*); and

- clarifying difficult areas of the law such as the Noerr and state action doctrines.

Administrative litigation is essential to the FTC's role of adjudicating the most complex antitrust issues. The new Administration should continue to emphasize the use of administrative litigation.

## IV. FULLY UTILIZING SECTION 5 OF THE FTC ACT

When Congress created the FTC, it sought to create an agency that could act beyond the narrow confines of the Sherman Act and attack unfair acts that might harm the competitive process. Thus, Congress provided Section 5 of the FTC Act, which empowers the FTC to prevent "unfair methods of competition." Under Section 5, the Commission may condemn conduct that does not violate the Sherman Act, but harms the competitive process. As the Supreme Court recognized in *Indiana Federation of Dentists*, this

> standard of 'unfairness' .. encompass[es] not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons.

Efforts to use Section 5 in an overly expansive fashion were rejected by the courts in the early 1980s and Section 5 fell into disuse for several years. There were some modest cases in which the FTC challenged invitations to collude but the powers of Section 5 to attack other competitively harmful practices were ignored. An exception was a recent standard setting case—*N-Data*, brought last year.

Fortunately, toward the end of last year, the FTC held a notable workshop on the use of Section 5 in competition cases. The workshop focused on three issues: (1) the history of Section 5, including Congress's enactment, the FTC's enforcement, and the courts' response; (2) the range of possible interpretations of Section 5; and (3) examples of business conduct that may be unfair methods of competition addressable by Section 5.

This evaluation is long overdue and essential, considering the recent changes in the economy. The rapidly evolving nature of competition demands that the FTC, like other enforcement agencies, fully utilize its enforcement powers. Section 5 of the FTC Act can be critically important to eliminating practices which may harm competition and lead to consumers paying higher prices or receiving less service. To give just one example, Section 5 can be used to attack facilitating practices in oligopolistic industries, which cannot be challenged under the Sherman Act. Unfortunately, because of relatively lax merger enforcement a far greater number of markets have become oligopolistic, significantly increasing the opportunities for firms to engage in forms of tacit collusion to raise prices. Not surprisingly, numerous markets have shown consistently increasing prices. The fact that the Justice Department has brought a record number of explicit collusion cases suggests that the problems of collusion are becoming ever more pervasive. And facilitating practices offer a convenient venue to achieve the same goals, where firms want to dampen competition but avoid criminal penalties.

## VI. CONCLUSION

In order to address the significant challenges of the rapidly evolving economy, the

new Chairman should aggressively deploy the arsenal of Commission powers, including the issuance of trade regulation rules, studies of past enforcement actions, hearings and workshops; a more selective targeting of enforcement efforts, aimed at maximizing the economic impact of agency resources; continued and even more muscular use of administrative litigation; and a disciplined but confident use of the FTC's powers under Section 5 of the FTC Act to address conduct falling within the 'penumbras' of the Sherman Act. These measures are vital for the FTC to fulfill its mission of providing a critical bulwark for effective functioning of the marketplace – and especially in such parlous economic times.