



**Asia-Pacific  
Economic Cooperation**

---

**2011/SOM1/CPLG/019**

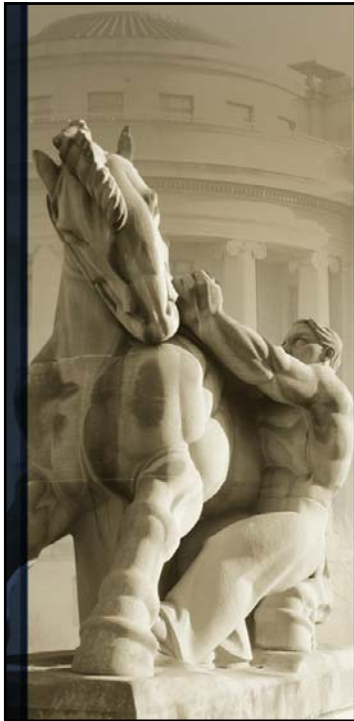
Agenda Item: 7

## **Federal Trade Commission Competition Advocacy: Practice and Effectiveness**

Purpose: Information  
Submitted by: United States



**Competition Policy and Law Group Meeting  
Washington, D.C., United States  
7-8 March 2011**



## Federal Trade Commission Competition Advocacy: Practice and Effectiveness

Christopher Grengs  
Attorney Advisor  
Federal Trade Commission  
Office of Policy Planning

APEC Competition Law and Policy Group Meeting  
March 8, 2011, Washington, D.C.

The views expressed herein are my own and do not necessarily reflect the views of the Federal Trade Commission, any of its individual Commissioners, or the Office of Policy Planning.

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



### Practice

- Objectives of Competition Advocacy
  - Support and promote competition principles
  - Inform policy makers and the public of the benefits of market competition
  - Inform policy makers and the public of the likely effects of laws, regulations, and other policies on competition and consumers
  - Combination of legal and economic analysis

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Practice

- Rationale for Advocacy
  - Anticompetitive laws, regulations, and policies can substantially burden competition and consumers
  - It may be hard for dispersed consumers to stop or remove anticompetitive policies, versus more concentrated interest groups
  - Antitrust exemptions for certain conduct relating to states' powers and lobbying for government for action
  - Expert agency analysis may overcome these problems and influence decision making in favor of competition and consumers
  - Advocacy is efficient because it requires only a small amount of resources, relative to other tools like litigation

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Practice

- FTC Jurisdiction
  - Section 5 of the FTC Act
    - FTC is “empowered and directed to prevent . . . unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”
    - 15 U.S.C. 45(a)
  - Section 6 of the FTC Act
    - Allows the FTC to “gather and compile information” that concerns persons subject to the FTC Act, and “to make public from time to time such portions of the information obtained” that are “in the public interest.”
    - 15 U.S.C. 46(a), (f)

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Practice

---

- Advocacy Tools
  - Letters, comments, testimony
    - Specific invitation
    - General invitation for public comments
  - Amicus curiae briefs
    - Cases raising significant competition issues
  - Reports, studies
    - Often based on FTC workshops on cutting-edge topics
  - Informal discussions
    - Legislators, executive branch officials, regulators

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Practice

---

- FTC Resources
  - Office of Policy Planning
    - Reports to the FTC Chairman's Office
  - Bureau of Economics
  - Bureau of Competition
  - Office of General Counsel
  - Bureau of Consumer Protection
  - Office of International Affairs
  
  - Letters, comments, testimony, amicus briefs
    - ~ 1-5 attorneys, economists + management, Commission review = 1 month+
  - Reports, studies
    - ~ 5-15 attorneys, economists + management, Commission review = 6 months+

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Practice

- **FTC Approach to Competition Advocacy**

- “[C]ompetition will produce not only lower prices, but also better goods and services. . . . [A]ll elements of a bargain – quality, service, safety, and durability . . . are favorably affected by the free opportunity to select among alternative offers.”

- *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978)

- Competition should be restricted only when necessary to achieve some “countervailing procompetitive virtue” – such as protecting the public from significant harm – and such restrictions should be narrowly drawn

- *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986)

- Evaluate empirical evidence
- Consider relationship to consumer protection issues that affect information and consumer choice

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Practice

- **Selected Areas of Interest**

- 1980-1993 Transportation regulatory reform
- 1983-1995 Telecommunications regulatory reform
- 1984-2011 Regulation of professions
  - Lawyers, doctors, nurses, dentists, optometrists, veterinarians
- 1985-2011 Gasoline
  - Gas pricing, distribution
- 1985-2011 Health Care
  - Doctor collective bargaining, drug dispensation and distribution, entry of new facilities
- 1995-2011 Electricity regulation and restructuring
- 2003-2011 Barriers to Internet commerce
- 2006-2011 Internet
  - Access, privacy, data security

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

- Basic Cost-Benefit Analysis

- “Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission’s entire budget.”

- *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, Reprinted in 58 Antitrust Law Journal 43, 94 (1989)

- FTC advocacy activities have historically used only around 10-12 individuals and about 1-4% (\$2 million FY 2005) of the FTC’s budget

- Deborah Platt Majoras, *A Dose of Our Own Medicine: Applying a Cost / Benefit Analysis to the FTC’s Advocacy Program* (2005)

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

- Challenges to Measuring Effectiveness

- Whether outcomes consistent with the FTC’s position were influenced by FTC – or merely coincidental
- Separating out FTC influence from other factors
- Determining the degree of FTC influence
- No response to FTC inquiries in some cases
- Some recipients may not welcome FTC comments

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

- 1987 Advocacy Survey

- 41 responses / 79 surveys of state and local recipients for June 1985-87
- 36 responses on consistency of recipient actions with FTC recommendations
  - 6%: totally effective      33%: moderately effective
  - 11%: slightly effective      50%: ineffective
- 37 responses on FTC perspective, versus other sources
  - 25%: not presented by others or already known
  - 50%: provided by others or already known to a limited degree
  - 25%: duplicative of others or already known
- Responses on weight of comment because it came from FTC
  - 47%: substantial weight      20%: limited weight      33%: did not affect
- Arnold C. Celnickier, *The Federal Trade Commission's Competition and Consumer Protection Advocacy Program*, 33 Saint Louis University Law Journal 379 (1989)

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

- 2006 Advocacy Survey

- 36 responses / 80 surveys to recipients and bill sponsors for June 2001-06
- FTC comments considered during deliberations
  - 94%: agreed or strongly agreed      3%: disagreed      1%: no opinion
- Recipients gave more weight to comment because from FTC
  - 80%: agreed or strongly agreed      11%: disagreed      8%: no opinion
- FTC comments gave information previously not considered
  - 55%: agreed or strongly agreed      22%: disagreed      22%: no opinion
- FTC comments influenced ultimate outcome
  - 54%: agreed or strongly agreed      11%: disagreed      31%: no opinion

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

- 2006 Advocacy Survey

- FTC comments provided sound analysis and clear reasoning
  - 75%: agreed or strongly agreed      11%: disagreed      15%: no opinion
- FTC comments would be useful for other relevant issues
  - 73%: agreed or strongly agreed      12%: disagreed      17%: no opinion
- Respondents who disagreed favored policies FTC criticized
- Outcomes
  - 61%: FTC recommendations adopted
  - 56%: Outcome consistent with FTC position
    - When outcome is consistent with FTC position, 79% of respondents said FTC influenced outcome
  - Note of the United States, OECD Roundtable on Evaluation of the Actions and Resources of Competition Authorities (2007)

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

- 2010 FTC Performance and Accountability Report

- Performance Measure 2.3.3, number of competition advocacy comments and amicus briefs
  - Target: 6
  - Actual: 17 (12 advocacies and 5 amicus briefs)
- Performance Measure 2.3.4, survey responses finding advocacy to be “useful”
  - 8 responses / 12 advocacies (excludes 5 amicus briefs)
  - Target: 50%
  - Actual: 100%
  - Target percentage recognizes comments critiquing a recipient’s proposed action may not be assessed positively
- Targets may be modified over time

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION





## Effectiveness

---

- Other Ways to Measure Effectiveness?
  - Improve survey
  - Recipient communication or outreach to the FTC
  - Citations to FTC comments and amicus briefs
    - Federal Register materials
    - Other agency materials
    - Case decisions
  - Similar recipient statements
    - Deliberations
    - Letters
    - Speeches
    - Quotes in news articles

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

---

- Direct Evidence – Advocacies
  - FTC staff comments on California bill to require pharmacy benefit managers to disclose certain information (Sept. 7, 2004)
    - Staff: bill likely to limit competition and increase drug prices
  - Governor Schwarzenegger vetoes bill (Sept. 29, 2004)
    - “Studies, including one from the Federal Trade Commission, have shown that enactment of this legislation will limit competition and significantly increase the cost of prescription drugs.”

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

### • Direct Evidence – Advocacies

- FTC staff files two comments with Louisiana legislature on bill to restrict dentistry in schools (May 2009)
  - Staff: bill likely to harm children seeking dental care
- Louisiana Times-Picayune newspaper cites staff position (May 20, 2009)
- Bill passes allowing dentistry in schools and requiring Louisiana Board of Dentistry to issue rules to make care safe (July 7, 2009)
- FTC staff files comments with Board on proposed rules (Dec. 2009)
  - Staff: rules would make mobile dentistry harder and deny many children dental care
- Board adopts rules for dentistry in schools and other mobile settings (May 2010)
  - More access to dental care for Louisiana children
- Board President cites FTC staff concerns about barriers to care as having influenced rulemaking (July 20, 2010)

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Effectiveness

### • Direct Evidence – Reports

- FTC Staff, *Possible Anticompetitive Barriers to E-Commerce: Wine* (2003)
- *Granholt v. Heald*, 544 U.S. 460 (2005)
  - Michigan and New York laws regulated wine sales from other states to give in-state wineries a competitive advantage
  - Supreme Court: laws unconstitutional because they discriminate against interstate commerce
  - Report cited as evidence that discrimination against out-of-state wineries limits direct to consumer wine sales – including Internet sales
  - “According to the Federal Trade Commission (FTC), ‘[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.’ ”

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Some References

- FTC, About the Office of Policy Planning, <http://www.ftc.gov/opp/about.shtm>
- FTC, Advocacy Filings by Date, [http://www.ftc.gov/opp/advocacy\\_date.shtm](http://www.ftc.gov/opp/advocacy_date.shtm)
- FTC, Advocacy Filings by Subject, [http://www.ftc.gov/opp/advocacy\\_subject.shtm](http://www.ftc.gov/opp/advocacy_subject.shtm)
- FTC, Amicus Briefs, <http://www.ftc.gov/ogc/briefs.shtm>
- FTC, Reports, <http://www.ftc.gov/opp/reports.shtm>
- FTC, Conferences and Workshops, <http://www.ftc.gov/ftc/workshops.shtm>
- FTC, Performance and Accountability Report, Fiscal Year 2010, <http://www.ftc.gov/opp/gpra/2010parreport.pdf>

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Some References

- William E. Kovacic, *The FTC at 100: Into Our 2<sup>nd</sup> Century* (2009), <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>
- Note of the United States, *OECD Roundtable on Evaluation of the Actions and Resources of Competition Authorities* (2007), <http://www.ftc.gov/bc/international/docs/evalauth.pdf>
- James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 *Antitrust Law Journal* 1091 (2005)
- Arnold C. Celnickier, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 *St. Louis University Law Journal* 379 (1989)

BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION



## Contact Information

---

Christopher Grengs, J.D.  
Federal Trade Commission  
Office of Policy Planning, HQ 308  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580  
(202) 326 -2612; [cgrengs @ ftc.gov](mailto:cgrengs@ftc.gov)

- The views expressed herein are my own and do not necessarily reflect the views of the Federal Trade Commission, any of its individual Commissioners, or the Office of Policy Planning.

BUREAU of COMPETITION  
FEDERAL TRADE COMMISSION

