Federal Trade Commission

Enforcement Priorities in the New Administration

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at the

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Thank you for the opportunity to speak to you today about the FTC's enforcement priorities in the early days of the new administration.

I.

Despite the downturn in the global economy and dramatic reduction in M&A activity, the FTC's merger enforcement divisions have remained busy. A recent FTC report noted that the number of FTC merger enforcement actions dropped by only 10% in our fiscal year ended September 30, 2009, compared to the prior year.[1] However, for transactions reported under the

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Darren Tucker, for his invaluable assistance in preparing this paper.

[1] Federal Trade Commission, Performance and Accountability Report, Fiscal Year 2009, at 56.

Hart-Scott-Rodino Act, the number of enforcement actions actually increased, albeit slightly.[2] Over the same period, the percentage of second requests issued as a percentage of reported transactions increased from 1.3% to 2.2%.[3]

Since President Obama appointed our new Chairman on March 2, 2009, the agency has sued to block or unwind three transactions in court,[4] which is an impressive rate given that the agency has in recent years brought an average of 1.5 merger challenges per year.[5] Since March, the agency has also entered into consent decrees in four other cases without the need for litigation.[6] In addition, the agency continued to prosecute four merger litigations and finalized

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[2] *Id.* at 59.

[3] *Id.* at 56.

[4] Two of these were subsequently abandoned. *See* Administrative Complaint, In the Matter of Thoratec Corp., FTC Docket No. 9339 (July 30, 2009), *available at* http://www.ftc.gov/os/adjpro/d9339/090730thorateadminccmpt.pdf (alleging that merger would substantially lessen competition for left ventricular assist devices); Complaint, FTC v. CSL Ltd., Case No. 09-cv-1000-CKK (D.D.C. May 28, 2009), *available at* http://www.ftc.gov/os/caselist/0810255/090602cslcmpt.pdf (alleging that merger would substantially lessen competition for certain plasma-derivative protein therapies). The third was resolved with a consent decree. *See* Carilion Clinic; Analysis of Agreement Containing Consent Orders To Aid Public Comment, 74 Fed. Reg. 53252 (Oct. 16, 2009) (proposed consent agreement requiring the divestiture to a Commission-approved buyer of outpatient imaging services and outpatient surgical services in Roanoke, Virginia).

[5] Fed. Trade Comm'n, The FTC in 2009, at 13 (Mar. 2009) (1 merger enforcement action in FY 2005, none in FY 2006, 3 in FY 2007, and 2 in FY 2008). Matters in which the Commission authorized both an administrative and federal court complaint were counted only once. *See id.*

[6] Decision and Order, In the Matter of Schering-Plough Corp., FTC Docket No. C-4268 (Oct. 29, 2009), *available at* http://www2.ftc.gov/os/caselist/0910075/091029merckscheringdo.pdf (proposed consent agreement requiring the divestiture to upfront buyers of Merck's interest in an animal health joint venture and Schering-Plough's NK 1 receptor antagonist business); Decision and Order, In the Matter of Pfizer Inc., FTC Docket No. C-4267 (Oct. 14, 2009), *available at* http://www2.ftc.gov/os/caselist/0910053/091014pwyethdo.pdf (proposed consent agreement requiring the divestiture to an upfront buyer of certain vaccines and other pharmaceutical products for cattle, dogs, cats, and horses); K+S Aktiengesellschaft; Analysis of Agreement Containing Consent Order to Aid Public Comment, 74 Fed. Reg. 51151 (Oct. 5, 2009) (proposed consent agreement requiring divestiture of assets to two up-front buyers of assets relating to the

four consent decrees that began under the Bush administration.[7] Two of these litigations were resolved favorably for the agency;[8] two are ongoing.[9] In other words, it's fair to say that the agency's merger enforcement efforts remain active despite a sagging economy and that the agency is not gun-shy about going into court to block anticompetitive mergers.

Let me turn to some of the agency's merger enforcement priorities. As a general matter, the FTC manages its limited resources by focusing on industries that most directly affect

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bulk de-icing salt business in two states); BASF SE; Analysis of Agreement Containing Consent Orders to Aid Public Comment, 74 Fed. Reg. 16208 (Apr. 9, 2009) (proposed consent agreement requiring the divestiture to a Commission-approved buyer of certain assets relating to two high-performance pigments).

[7] Press release, Fed. Trade Comm'n, FTC Approves Final Consent Order Related to Reed Elsevier NV and ChoicePoint Inc. (June 5, 2009), *available at* http://www.ftc.gov/opa/2009/06/choicepoint.shtm (final approval of consent agreement requiring divestuiture of assets related to electronic public records services for law enforcement customers); Press release, Fed. Trade Comm'n, Commission Approves Final Consent Order in Matter of Lubrizol Corporation and Lockhart Company (Apr. 10, 2009), *available at* http://www.ftc.gov/opa/2009/04/lubrizol.shtm (final approval of consent agreement requiring divestiture of rust inhibitor assets for a consummated merger); Press release, Fed. Trade Comm'n, Commission Approves Final Consent Order in Matter of Dow Chemical Company and Rohm & Haas Company (Apr. 3, 2009), *available at* http://www.ftc.gov/opa/2009/04/nyrohmhaas.shtm (final approval of consent agreement requiring divestiture to FTC-approved acquirer of assets relating to acrylic monomer, hollow sphere particle, and acrylic latex polymer); Press release, Fed. Trade Comm'n, Commission Approves Final Consent Order in Matter of Getinge AB and Datascope Corp. (Mar. 13, 2009), *available at* http://www.ftc.gov/opa/2009/03/getinge.shtm (final approval of consent agreement requiring divestiture of certain devices used in coronary bypass surgery).

[8] *FTC v. CCC Holdings, Inc*., 605 F. Supp. 2d 26 (D.D.C. 2009) (enjoining merger of automobile insurance software providers); Whole Foods Market, Inc.; Analysis of Agreement Containing Consent Orders to Aid Public Comment, 74 Fed. Reg. 10913 (Mar. 13, 2009) (proposed consent agreement requiring the divestiture of 32 supermarkets and related assets).

[9] Complaint, FTC v. Ovation Pharms., Inc., Civil No. 08-6379 (JNE/JJG) (D. Minn. Dec. 16, 2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationcmpt.pdf (alleging that consummated acquisition substantially lessened competition and maintained a monopoly in drugs used to treat a congenital heart defect in premature babies); Administrative Complaint, In the Matter of Polypore Int'l, Inc., FTC Docket No. 9327 (Sept. 9, 2008), *available at* http://www.ftc.gov/os/adjpro/d9327/091008cmp9327.pdf (alleging that consummated merger substantially lessened competition for certain battery separators).

consumers and in which the agency has particular expertise. Those industries include healthcare, energy, chemicals, technology, and consumer goods and services. For many years, one of the agency's enforcement priorities has been the $2.6 trillion healthcare industry, which accounts for one-sixth of the U.S. economy. The rising cost of healthcare is major concern for many Americans and the subject of much recent debate in Congress. The Commission is committed to doing everything it can to promote competition, choice, and innovation in healthcare markets, including by preventing anticompetitive mergers. Our current Chairman has made no secret that this industry is a particular priority of his, and our staff responsible for healthcare mergers have been particularly busy. Indeed, seven of the merger enforcement cases that I just mentioned involved the healthcare industry, including mergers involving medical devices,[10] pharmaceuticals,[11] and hospitals and medical facilities.[12]

Another industry over which the Commission exercises special vigilance is the energy sector, in particular the markets for crude oil, gasoline, and other petroleum products. The agency plays an important role in maintaining competition and protecting consumers in energy markets, which often directly affect consumers' pocketbooks. One of the FTC's merger shops is devoted to energy issues, and we have personnel dedicated to energy concerns elsewhere within the agency. For example, the Commission actively monitors retail and wholesale prices of gasoline and diesel fuel across the country in an attempt to identify unusual price movements

[10] Thoratec Administrative Complaint, *supra* note 4 (left ventricular assist devices); FTC Press Release Regarding Getinge/Datascope, *supra* note 7 (devices used in coronary bypass surgery).

[11] Pfizer Decision and Order, *supra* note 6 (animal drugs and vaccines); Schering-Plough Decision and Order, *supra* note 6 (animal and human drugs); Ovation Complaint, *supra* note 9 (drugs used to treat a congenital heart defect in premature babies); CSL Complaint, *supra* note 4 (plasma-derivative protein therapies).

[12] Carilion Aid to Analysis, *supra* note 4 (outpatient medical clinics).

that might result from anticompetitive conduct. At Congress's direction, the FTC recently completed a rulemaking, which went into effect on November 4, 2009 and prohibits market manipulation in the wholesale petroleum industry.[13]

Ensuring competition in the high-tech sector is another priority for the agency. Competition in the technology sector, including products such as computer hardware and software, is critical to consumers and the economy. The development of technologically complex products and services helps drive economic expansion by lowering costs and fostering further innovation. At the FTC, two of the FTC's merger enforcement actions in the new administration involved high-tech industries, including one in software products and one in electronic records.[14]

The chemicals industry is another area with a long history of FTC merger enforcement. Since March, the agency has entered into or finalized consent decrees in five mergers in the chemicals business. The products at issue ranged from rust inhibitors to acrylics, de-icing salt, battery separators, and high-performance pigments.[15]

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[13] Prohibitions on Market Manipulation, 74 Fed. Reg. 40686 (Aug. 12, 2009), *codified at* 16 C.F.R. Part 317. As I have previously indicated, I have some misgivings about the new rules. *See* Concurring Statement of Commissioner J. Thomas Rosch, Crude Oil Price Manipulation Rule Making, Project No. P082900 (Aug. 6, 2009), *available at* http://www.ftc.gov/os/2009/08/P082900mmr_rosch.pdf.

[14] FTC Press Release Regarding Reed Elsevier/ChoicePoint, *supra* note 7 (electronic public records services); *FTC v. CCC Holdings, Inc*., 605 F. Supp. 2d 26 (D.D.C. 2009) (automobile insurance software providers). In addition, the FTC charged a software company with failing to adhere to an FTC consent decree. *See infra* note 21 and accompanying text.

[15] K+S Aktiengesellschaft Aid to Analysis, *supra* note 6 (bulk de-icing salt); FTC Press Release Regarding Lubrizol/Lockhart, *supra* note 7 (rust inhibitor assets); BASF Aid to Analysis, *supra* note 6 (high-performance pigments); FTC Press Release Regarding Dow/Rohm & Haas, *supra* note 7 (acrylics); Polypore Administrative Complaint, *supra* note 9 (battery separators).

The Commission also focuses its merger enforcement resources on certain consumer goods, supermarkets, and retail industries. These often raise concerns that are local in nature but can still have significant effects on consumers. A significant achievement for the agency in this area was the favorable settlement with Whole Foods after over a year of federal court litigation.[16] Under the consent order, Whole Foods will sell 32 supermarkets and related assets to restore the competition that was eliminated by its 2007 acquisition of its closest rival.

Since the premerger notification filing thresholds substantially increased in 2001, the FTC has made a priority of investigating *consummated* mergers that were not reportable under the HSR Act. During the Bush administration the FTC and DOJ together challenged eighteen consummated mergers.[17] The FTC's interest in reviewing and, where appropriate, challenging consummated acquisitions remains strong in the new administration. Under Chairman Leibowitz, the FTC has already challenged one consummated transaction,[18] finalized a consent decree for another,[19] and continues to prosecute two other cases that began under the prior administration.[20]

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[16] Whole Foods Aid to Analysis, *supra* note 8.

[17] *See* Ilene Knable Gotts & James F. Rill, *Reflections on Bush Administration M&A Antitrust Enforcement and Beyond*, COMPETITION POL'Y INT'L, Spring 2009, at 101, 108.

[18] Carilion Aid to Analysis, *supra* note 4 (proposed consent agreement resolving FTC's concerns regarding consummated acquisition of outpatient imaging services and outpatient surgical services in Roanoke, Virginia).

[19] FTC Press Release Regarding Lubrizol/Lockhart, *supra* note 7 (final approval of consent agreement requiring divestiture of rust inhibitor assets for a consummated merger).

[20] Ovation Complaint, *supra* note 9 (alleging that consummated acquisition substantially lessened competition and maintained its monopoly in drugs used to treat a congenital heart defect in premature babies); Polypore Administrative Complaint, *supra* note 9 (alleging that consummated merger substantially lessened competition for certain battery separators).

A final priority for the agency is ensuring that parties adhere to FTC merger regulations and orders. In July, the agency found that a party had violated a 2004 consent decree that required it to divest certain assets in a timely manner. Under a new consent agreement, the company must take additional steps to fully restore competition in the affected markets and submit to oversight by an FTC-approved monitor.[21] And in June, the FTC in conjunction with the DOJ charged an individual with failing to report a number of transactions under our premerger notification rules and required the individual to pay a $1.4 million civil penalty.[22] Finally, new rules governing our Part 3 administrative litigation at the FTC went into effect earlier this year.[23]

II.

On September 22, 2009, the FTC and DOJ announced plans to hold joint workshops to explore the possibility of updating the Horizontal Merger Guidelines (Guidelines).[24] The workshops are intended to determine whether the Guidelines "accurately reflect the current practice of merger review at the FTC and DOJ, as well as to take into account legal and

[21] Aspen Technology, Inc.; Analysis to Aid Public Comment on Proposed Agreement Containing Order to Show Cause and Order Modifying Order, 74 Fed. Reg. 36712 (July 24, 2009).

[22] Final judgment, United States v. Malone, 2009-1 Trade Cases (CCH) ¶ 76,659 (D.D.C. 2009), *available at* http://www.usdoj.gov/atr/cases/f247500/247529.pdf.

[23] On October 7, 2008, the FTC published a Notice of Proposed Rulemaking detailing proposed rule revisions and inviting public comment. *See* 73 Fed. Reg. 58832. On January 13, 2009, the FTC published interim final rules, which governed all proceedings commenced after that day. *See* 74 Fed. Reg. 1804. On May 1, 2009, the Commission published final rules, adopting the interim rules subject to a few revisions. *See* 74 Fed. Reg. 20205. The final rules govern all proceedings initiated on or after May 1, 2009. *See id.*

[24] Press Release, Federal Trade Commission, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009), *available at* http://www.ftc.gov/opa/2009/09/mgr.shtm. Additional information about the workshops is available at http://www.ftc.gov/bc/workshops/hmg/.

economic developments that have occurred since the last significant Guidelines revision in 1992."[25] The agencies plan to solicit comments on particular topics and to hold a series of five public workshops in December 2009 and January 2010.

The project is limited to horizontal merger enforcement. The agencies are not updating their non-horizontal merger guidelines, which were last revised in 1984.[26] Some of you may find this curious, given the greater passage of time since the non-horizontal guidelines were issued and the possible momentum from the European Commission's promulgation of non-horizontal merger guidelines last year.[27] Nevertheless, I believe that the agencies are wise to prioritize revising the horizontal guidelines. First, there are very few challenges to non-horizontal mergers in the United States, making accurate, up-to-date guidelines in this area less urgent than in the horizontal context. And second, revising the horizontal guidelines is likely to be much simpler, given that there is far less consensus in the United States as to appropriate enforcement standards for vertical mergers than horizontal mergers.

As the agencies consider revising the Horizontal Merger Guidelines in the coming months, I expect that the existing *content* of the current Guidelines will be largely retained,

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[25] *Id*.

[26] U.S. Dep't of Justice, Merger Guidelines § 4.0, 49 Fed. Reg. 26,823 (1984), *available at* http://www.usdoj.gov/atr/public/guidelines/2614.htm [hereinafter 1984 Guidelines]. The part of those guidelines addressing non-horizontal mergers is still valid today, although rarely cited. *See* U.S. Department of Justice and Federal Trade Commission Statement Accompanying Release of Revised Merger Guidelines (1992) ("Neither agency has changed its policy with respect to non-horizontal mergers. Specific guidance on non-horizontal mergers is provided in Section 4 of the Department's 1984 Merger Guidelines read in the context of today's revisions to the treatment of horizontal mergers.").

[27] Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings § 5, 2008 O.J. (C 265) 6 (2008); *see also* Case T-210/01, *General Elec. v. Commission* [2005] ECR II-000 ¶ 73; Case C-12/03 P, *Commission v. Tetra Laval BV* [2003], ECR I-000 ¶¶ 74-76.

including the hypothetical monopolist test, the use of the Herfindahl-Hirschman Index (HHI), the timeliness-likelihood-sufficiency approach to entry analysis, consideration of efficiencies, and inclusion of a failing firm defense.[28] Many of the proposed revisions should not be a surprise to practitioners in the United States, as they reflect what the agencies have previously said in speeches, reports, and closing statements.[29]

One important change that may occur, however, is a *restructuring* of that content to recognize upfront the role of direct effects evidence in merger analysis. Direct effects evidence is evidence indicating the likely competitive effects of a transaction or practice that is not based on inferences drawn from market concentration. Examples of direct effects evidence include an acquiring company's post-merger plans, evidence that competition between the merging parties has led to lower prices or other competitive benefits, changes in prices or output from a consummated merger, and the results of natural experiments (which show the effect of a change in concentration or the number of competitors).

The 1992 Guidelines offer little support for the use of direct effects evidence. Instead, the 1992 Guidelines require that merger analysis proceed in a step-by-step fashion starting with market definition. Only after the market is defined—and the market participants identified and concentration levels determined—are the likely competitive effects of a transaction assessed.

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[28] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines: Questions for Public Comment 1-2 (Sept. 22, 2009), http://www.ftc.gov/bc/workshops/hmg/hmg-questions.pdf; Christine A. Varney, Assistant Att'y Gen., Antitrust Div. U.S. Dep't of Justice, Merger Guidelines Workshops 10 (Sept. 22, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/250238.pdf.

[29] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the 1992 Horizontal Merger Guidelines (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf [hereinafter Commentary].

Notwithstanding that direct effects evidence is given relatively short shrift in the 1992 Guidelines, the agencies do in fact consider such evidence in the course of merger review. As a 2006 FTC/DOJ report stated, "the Agencies do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets."[30] Rather the agencies favor "an integrated approach" where the emphasis is on competitive effects and that "evidence of effects may be the analytical starting point."[31] In the *Evanston Northwestern* case, the FTC stated that "we do not rule out the possibility that a future merger case may lead us to consider whether complaint counsel must always prove a relevant market."[32]

I respectfully suggest that the Guidelines' current treatment of market definition as a "gating item" is a mistake. Focusing on market definition risks obscuring the ultimate question under Section 7 of the Clayton Act, which is whether the transaction is likely to substantially lessen competition. The answer to that ultimate question may turn on market definition but it doesn't have to in all cases.

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[30] *Id*. at 2; *see also* Opinion of the Commission at 54, In the matter of Evanston Northwestern Healthcare Corp., FTC Docket No. 9315 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf ("Although the courts discuss merger analysis as a step-by-step process, the steps are, in reality, interrelated factors, each designed to enable the fact-finder to determine whether a transaction is likely to create or enhance existing market power.").

[31] Commentary, *supra* note 29, at 2, 10; *see also id*. at 11 ("In some cases, competitive effects analysis may eliminate the need to identify with specificity the appropriate relevant market . . . .").

[32] Opinion of the Commission at 88, In the matter of Evanston Northwestern Healthcare Corp., FTC Docket No. 9315 (Aug. 6, 2007) (dicta), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf; *see also id*. at 86-87 (dicta) (market definition "is potentially much less important in merger cases in which the availability of natural experiments allows for direct observation of the effects of competition between the merging parties.").

It is important to keep in mind that market definition is not an end in itself but rather an indirect means of determining the presence of market power or the likelihood that it will be exercised. By contrast, direct evidence can shed light directly on whether a proposed transaction is likely to facilitate the exercise of market power. For example, we sometimes see projections in acquiring companies' pre-merger documents as to how a transaction will affect the company's prices. That kind of evidence is more probative to me than inferences based on changes in concentration (except perhaps in extreme cases such as mergers to monopoly or duopoly).

I also think a focus on competitive effects is an easier story for the government to tell and for a court to understand. A case focused on market definition risks getting bogged down in esoteric fights over the SSNIP test. Asking customer witnesses whether they would have switched to an alternative in the face of a 5% price increase is arguably not a persuasive line of questioning. Contrast that to the use of documents or testimony showing whether there have been recent competitive interactions between the merging companies resulting in lower prices or other consumer benefits.

The agencies should be on safe ground when using direct effects evidence in court. The Supreme Court has held that direct effects evidence can establish a violation of the Sherman Act in a non-merger case, even without proof of market power in a relevant market.[33] The D.C. Circuit has twice suggested that a Section 7 violation could be predicated on direct effects evidence. In *Baker Hughes*, Judge (now Justice) Thomas stated that "[m]arket share is just a

[33] *See FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquires into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." (quotations omitted)). Judge Posner has observed that judicial interpretation of Section 1 of the Sherman Act and Section 7 of the Clayton Act has converged. *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1281-83 (7th Cir. 1990).

way of estimating market power, which is the ultimate consideration . . . . When there are better ways to estimate market power, the court should use them."[34] In the D.C. Circuit's *Whole Foods* decision, Judge Brown stated that "defining a market and showing undue concentration in that market . . . does not exhaust the possible ways to prove a § 7 violation on the merits."[35] Several district courts have relied on direct effects evidence in evaluating proposed transactions. In the *Staples* case, for example, pre-merger business records indicated that prices tended to increase as the number of office superstores declined.[36]

All of this is not to say that the agencies can eschew market definition altogether. When the agencies go into federal court, they must at least identify the "rough contours" of the relevant market, as the Seventh Circuit has held in a Sherman Act case.[37] That makes sense. For one thing, the language of Section 7 makes clear that a relevant market must be established. Moreover, it is implausible to argue (or conclude) that a merger is likely to have competitive effects without describing at least roughly those who are likely to be adversely affected by it. But I would contend that relevant markets can often be defined by use of direct effects evidence.

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[34] *United States v. Baker Hughes Inc*., 908 F.2d at 981, 992 (D.C. Cir. 1990) (quoting *Ball Memorial Hosp. v. Mut. Hosp. Ins*., 784 F.2d 1325, 1336 (7th Cir. 1986)). Judge (now Justice) Ruth Bader Ginsburg was also on the *Baker Hughes* panel.

[35] *FTC v. Whole Foods Market, Inc*., 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.) (dicta). In particular, "it might not be necessary to understand the market definition" in a unilateral effects case involving differentiated products, at least at the preliminary injunction stage. *Id*. at 1036 n.1 (Brown, J.) (dicta).

[36] *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997).

[37] *Republic Tobacco Co. v. N. Atlantic Trading Co*., 381 F.3d 717, 737 (7th Cir. 2002) ("[I]f a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.")

I have described this as "backing into" the market definition.[38] Others have described the competitive effects evidence and the market definition evidence as "two sides of the same coin."[39] Both mean the same thing to me: the relevant markets need not be defined in the order or in the fashion set forth the current Merger Guidelines.

As the agencies contemplate possible revisions to the Merger Guidelines, I hope the drafters keep two other priorities in mind: simplicity and consensus. As the 1992 Guidelines themselves note, the purpose of the Guidelines is to state the enforcement policy of the DOJ and FTC concerning horizontal acquisitions and mergers "as simply and clearly as possible."[40] The Merger Guidelines should be understandable not only to antitrust lawyers and economists but to businesspeople and other interested parties. This means that the Merger Guidelines should eschew economic formulae and jargon. If an economic concept cannot be explained in brief narrative text, it has no place in the Guidelines. The need for simplicity is particularly important in light of the key role of economists in this project and because several of the proposed topics

[38] *See* Concurring Opinion of Commissioner J. Thomas Rosch at 2, 7-10, In the Matter of Evanston Northwestern Healthcare Corp., FTC Docket No. 9315 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf; *see also* Opinion of the Commission at 60, In the matter of Evanston Northwestern Healthcare Corp., FTC Docket No. 9315 (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf ("[I]f a merger enables the combined firm unilaterally to raise prices by a SSNIP for a non-transitory period due to the loss of competition between the merging parties, the merger plainly is anticompetitive, and the merging firms comprise a relevant antitrust market . . . ."); Commentary, *supra* note 29, at 10 ("Evidence pertaining more directly to a merger's actual or likely competitive effects also may be useful in determining the relevant market in which effects are likely. Such evidence may identify potential relevant markets and significantly reinforce or undermine other evidence relating to market definition.").

[39] Brief of Appellant at 38, FTC v. Whole Foods Market, Inc., No. 07-5276 (D.C. Cir. Jan. 14, 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf.

[40] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 0 (1992, rev. 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter Guidelines].

the drafters identified for discussion are technical economic concepts that will not be familiar to non-economists.

The other priority the drafters need to keep in mind is the need for consensus. The 1992 Guidelines have been successful in large measure due to their acceptance by both agencies and every administration since their adoption. The next version of the Guidelines will need to attain a similar level of consensus to be successful. Six votes in favor of the revisions—one from the AAG and one from each of the five FTC Commissioners—will be an important starting point.[41]

III.

A second priority for the FTC is investigating and, when appropriate, challenging unilateral conduct. As you know, in the United States, monopolization and attempted monopolization are condemned under Section 2 of the Sherman Act. In addition, the FTC can challenge unilateral conduct under Section 5 of the FTC Act.

In recent years, one of the agency's priorities has been challenging firms that harm competition by deceiving or reneging on their intellectual property commitments to standards setting bodies. For example, in the *Unocal* case, we alleged that the company failed to disclose its clean-fuel patents while helping to establish industry standards for reformulated gas that incorporated its technology.[42] In the *Rambus* case, the Commission found that the company had failed to disclose certain DRAM patents to a standard setting organization that ultimately adopted standards covered by the intellectual property. The Commission found that this conduct violated Section 2, but the Court of Appeals for the D.C. Circuit reversed for lack of causation

[41] I am assuming that we will have five Commissioners by the time any revised Guidelines are approved. We currently have only four sitting Commissioners, one of whose term has expired.

[42] We reached a consent agreement with Unocal shortly after trial before an FTC ALJ. *See* Union Oil Company of California; Analysis of Proposed Consent Order to Aid Public Comment, 70 Fed. Reg. 35434 (June 20, 2005).

between the deception and the selection of the standard.[43] In the *N-Data* case, we challenged under Section 5 a patent holder's breach of a predecessor's commitment to a standard setting organization to license certain Ethernet-related patents on defined royalty terms after the industry became committed to a standard incorporating the intellectual property.[44]

The agency has also used its Section 5 authority in what is known as a gap-filling function. For example, in the *Valassis* case, a leading producer of newspaper inserts made public statements in an analyst conference call that amounted to an invitation to collude to raise prices and allocate customers. Price fixing is, of course, prohibited by Section 1 of the Sherman Act, but that statute does not cover invitations to collude. As a result, we relied on Section 5, which does not have a similar limitation, to challenge the solicitation.[45]

So where does that leave the state of Section 2 enforcement today? Of course, I cannot comment on the Antitrust Division's plans, but Christine Varney, the new head of the Antitrust Division at the Department of Justice, has already spoken several times on the need to reinvigorate enforcement of Section 2.[46] The FTC is similarly committed to challenging

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[43] *Rambus, Inc. v. FTC*, 522 F.3d 456, 469 (D.C. Cir. 2008).

[44] The FTC's claim was resolved through a consent order. *See* Negotiated Data Solutions LLC; Analysis of Proposed Consent Order to Aid Public Comment, 73 Fed. Reg. 5846 (Jan. 31, 2008).

[45] The case was resolved with a consent order. *See* Valassis Communications, Inc.; Analysis of Agreement Containing Consent Order To Aid Public Comment, 71 Fed. Reg. 13976 (Mar. 20, 2006). The agency has also challenged a number of reverse payment, or pay-for-delay, cases in the pharmaceutical industry; although, these were primarily Section 1 cases.

[46] *See, e.g.*, Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era, Remarks prepared for the Center for American Progress 5 (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245711.pdf (calling for "[v]igorous antitrust enforcement action under Section 2 of the Sherman Act").

monopolists and would-be monopolists that engage in exclusionary conduct, particularly in the standards-setting context.

Since the start of the new administration, there has been one significant policy decision in the area of unilateral conduct: the DOJ's withdrawal of its single-firm conduct report. Let me start with some background. From June 2006 to May 2007, the DOJ and FTC held a series of joint hearings to explore the antitrust treatment of single-firm conduct. The agencies' goal was "to explore how best to identify anticompetitive exclusionary conduct for purposes of antitrust enforcement under Section 2 of the Sherman Act."[47]

On September 8, 2008, the Department of Justice issued a 213-page Report purportedly based on the hearings.[48] The FTC declined to join the DOJ's Report. Three of the four FTC Commissioners, including myself, issued a statement that criticized the Report as a "blueprint for radically weakened enforcement of Section 2 of the Sherman Act."[49] We explained that under the Report firms with monopoly power or near monopoly power would be able to engage in a

[47] Consumer Benefits and Harms: How Best to Distinguish Aggressive, Pro-Consumer Competition from Business Conduct To Attain or Maintain a Monopoly, 71 Fed. Reg. 17872 (Apr. 7, 2006).

[48] U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008) [hereinafter Report].

[49] Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice 1 (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf. Then-Chairman Kovacic issued a separate statement. *See* Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf.

variety of exclusionary practices "with impunity, regardless of potential foreclosure effects and impact on consumers."[50]

The Report was effective for only eight months. In May 2009, Christine Varney withdrew it, declaring that it "no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act."[51] She took particular exception to what she characterized as "an excessive concern with the risks of over-deterrence and a resulting preference for an overly lenient approach to enforcement."[52] Ironically, only two days after General Varney withdrew the Report, the European Commission announced a record fine under Article 82 against Intel for $1.45 billion.

I remarked a couple minutes ago about the importance of consensus as the agencies work to revise the Merger Guidelines. The DOJ's Section 2 Report provides a vivid example of the problems with agency reports that lack consensus. A unilateral conduct Report that had consensus politically and between the agencies might well have made a significant, lasting contribution to the development of Section 2 jurisprudence. Instead, the Report reflected an anti-enforcement philosophy that was destined not to have long-term support at either agency. I am hopeful that we have learned from that experience and that it will not be repeated as we attempt to revise the Merger Guidelines.

I had a number of objections to the DOJ's Report, but let me discuss two of them. One criticism is that the Report unnecessarily set forth a number of bright-line safe harbors that had

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[50] Statement of Commissioners Harbour, Leibowitz and Rosch, *supra* note 49, at 10.

[51] Varney, *supra* note 46, at 8; *see also* Press Release, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.pdf.

[52] Varney, *supra* note 46, at 8.

little, if any, basis in Supreme Court precedent.[53] For example, the Report adopted a rule of per se legality for refusals to deal by monopolists, regardless of purpose or effect.[54] This was contrary to the Supreme Court's *Trinko* decision[55] and would constrain the agencies' ability to investigate and prosecute conduct that might harm consumers. Another example was the broad safe harbor applicable to loyalty discounts in the Report, which would treat those practices as legal if they either satisfied a standard predatory pricing test *or* rivals "remain on the market."[56] This immunization of all or nearly all loyalty discounts by a firm with monopoly power finds no support in the caselaw and has the potential to harm consumers.

The Report also failed to consider that the cumulative effect of its safe harbors could be to eliminate liability entirely. Imagine a company that has monopoly power in the sale of widgets and also sells a variety of other products. The company locks up 30% of widget customers through profitable exclusive dealing arrangements. For the remaining 70% of the widget market, the monopolist offers loyalty discounts that result in some widget sales below cost (but not for the product as a whole). Customers that want to purchase one of the company's

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[53] Report, *supra* note 48, at 2-3 ("Where appropriate, the Department has set out 'safe harbors' to create certainty for businesses and encourage precompetitive activity. In other areas, the Department has articulated specific standards that should be applied."); *id.* at 46 ("The Department will continue to work to develop conduct-specific tests and safe harbors.").

[54] *Id*. at 129 ("The Department believes that antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.").

[55] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (stating that the right to refuse to deal with rivals is not "unqualified" and that a refusal to cooperate with rivals "[u]nder certain circumstances . . . can constitute anticompetitive conduct and violate § 2").

[56] Report, *supra* note 48, at 105 ("Rivals' continued presence in the market casts serious doubt on the existence of anticompetitive effects—consumers continue to benefit from the bundled discounting as well as rivals' presence. Accordingly, the Department believes that if rivals have not exited the market as a result of the bundled discounting and if exit is not reasonably imminent, courts should be especially demanding as to the showing of harm to competition.").

other products can only do so if they also purchase its widgets. The company refuses to sell an essential input for widgets to its rivals and brings a weak, but not frivolous, patent infringement case against its widget rivals. Taken together, the company's actions could well foreclose equally efficient rivals and harm consumers. Yet under the Report, the company's practices could be completely immunized under the various safe harbors, without even requiring the monopolist to come forward with any justifications for its exclusionary business practices.

To be sure, there can be a useful role for safe harbors and bright-line tests in antitrust enforcement. They can help create predictability for businesses and reduce litigation costs. But, as the Supreme Court has recognized, these tests are only appropriate in limited circumstances where there is a threat to consumer welfare from challenges to low prices.[57] It is important to bear in mind that Section 2 enforcement, by definition, only applies to firms with monopoly or near monopoly power, which is a small percentage of U.S. companies. That arguably makes the need for broad safe harbors and rules of per se legality in order to avoid over-enforcement less necessary than in some other areas of antitrust law.

Another problem with the Report was its adoption of the so-called disproportionality test.[58] Under that test, which was to be applied in the absence of a conduct-specific rule, a Section 2 plaintiff would have to demonstrate that the harm to competition substantially

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[57] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*., 549 U.S. 312 (2007).

[58] I have described elsewhere a number of other problems with the Report. *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm., Thoughts on the Withdrawal of the DOJ Section 2 Report, Remarks before the IBA/ABA Conference on Antitrust in a Global Economy 5-14 (June 25, 2009), *available at* http://www.ftc.gov/speeches/rosch/090625roschibareport.pdf.

outweighed the benefits.[59] That test was inconsistent with rule-of-reason analysis, which simply asks whether the anticompetitive harm outweighs the procompetitive effects.

The disproportionality test arguably requires a prohibitively high burden of proof and would cripple effective enforcement against monopolistic abuses. Indeed, the American Bar Association has observed that "the disproportionality standard appears more rigorous than the usual balancing of procompetitive and anticompetitive effects under the traditional rule of reason standard, and appears to establish a higher threshold for Section 2 liability."[60] I was also concerned that the disproportionality test, like other balancing tests,[61] is little more than an empty shell, leaving courts with no guidance on, for example, what consumer effects to value and by how much.

IV.

Another priority for the new administration at the FTC is the development of a mode or modes of analysis for evaluating resale price maintenance (RPM) claims.

Modern Section 1 jurisprudence includes a number of category-based classification schemes. Certain categories of conduct—agreements between or among horizontal competitors

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[59] Report, *supra* note 48, at 45. Areeda and Hovenkamp advocate a similar test. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 651a (3d ed. 2007 supp. 2009) (conduct is exclusionary if it "produce[s] harms disproportionate to any resulting benefits"); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 148 (2005).

[60] ABA Section of Antitrust Law Unilateral Conduct Committee & ABA Center for Continuing Legal Education, Analysis of DOJ's Section 2 Report (2008), *available at* http://www.abanet.org/media/youraba/200903/DOJSection2Report.pdf.

[61] For example, Steve Salop has also proposed an effects-based balancing test which assesses the net effects of the defendant's conduct on consumer welfare. *See* Steve C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 313, 329-30 (2006) ("This competitive effect-based antitrust standard essentially would compare the beneficial and harmful competitive aspects of the alleged exclusionary conduct in order to determine the overall impact on consumers.").

to fix prices, rig bids, and to allocate customers or territories—are illegal per se. That means that they are illegal without regard to their purpose or effect.[62]

Conduct that is not illegal per se is analyzed under the rule of reason. Rule of reason analysis is intended to assess whether the restraint in question "is one that promotes competition or one that suppresses competition."[63] The courts have developed several types of rule of reason analysis, consistent with the Supreme Court's statement in *California Dental* that there should be an "enquiry mete for the case, looking to the circumstances, details and logic of a restraint."[64]

For over 90 years, minimum resale price maintenance agreements were declared per se unlawful under the Supreme Court's *Dr. Miles* decision.[65] In 2007, the Supreme Court overruled *Dr. Miles* in the *Leegin* case, which held that minimum resale price maintenance agreements should be analyzed under the rule of reason.[66]

Leegin did not spell out which variation of the rule of reason should be applied to RPM. The analytical options include the full blown rule of reason suggested in decisions such as *Chicago Board of Trade*,[67] or a truncated rule of reason analysis, such as the type applied by the Supreme Court in *Indiana Federal of Dentists* and by the D.C. Circuit in *Polygram.*[68]

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[62] *See Catalano v. Target Sales*, 446 U.S. 643, 647 (1980 (per curiam) (price-fixing); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978) (facilitation of bid-rigging); *Palmer v. BRG of Georgia, Inc*., 498 U.S. 46, 49-50 (1990 (per curiam) (market allocation).

[63] *Prof'l Eng'rs*, 435 U.S. at 688.

[64] *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

[65] *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911).

[66] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U.S. 877 (2007).

[67] *Bd. of Trade of Chicago v. United States*, 246 U.S. 231 (1918).

[68] *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). In a recent speech, Assistant Attorney General Christine Varney

The *Leegin* decision can be read to suggest that a truncated analysis, such as the one applied in *Polygram,* might be suitable for analyzing minimum resale price maintenance agreements under some circumstances. The *Leegin* Court observed that "[a]s courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones."[69]

The question is whether, post-*Leegin*, RPM can be considered to be "inherently suspect," and thus a worthy object for the scrutiny under the *Polygram* analysis for certain horizontal restraints. On the one hand, the Court in *Leegin* stated that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated."[70] But at the same time, the *Leegin* Court stated that RPM can serve benign or competitive purposes. The Court also noted that evidence of price effects may only be the beginning point for further analysis of competitive harm. This seems to indicate that the Court viewed that RPM agreements are ordinarily less intrinsically dangerous than horizontal agreements among competitors.

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suggested a structured rule of reason analysis that could apply to many RPM arrangements. *See* Christine A. Varney, Assistant Att'y Gen., Antitrust Div. U.S. Dep't of Justice, Antitrust Federalism : Enhancing Federal/State Cooperation, Remarks as Prepared for the National Association of Attorneys General Columbia Law School State Attorneys General Program 7-14 (Oct. 7, 2009), *available at* http://www.justice.gov/atr/public/speeches/250635.pdf.

[69] *Leegin*, 551 U.S. at 898-99.

[70] *Id*. at 894.

In a 2008 decision, the Commission suggested a way to identify when RPM might be subjected to a truncated rule of reason analysis, such as *Polygram*'s "inherently suspect" approach.[71] The Commission observed that the *Leegin* court identified several factors suggesting that an RPM arrangement was anti-competitive. The presence of one or more of these factors in a particular case should be sufficient to invoke the inherently suspect mode of analysis, thus shifting the burden to the defendants to demonstrate that the arrangement is pro-competitive, or at least competitively neutral. For example, the presence of resale price maintenance in a highly concentrated industry should be sufficiently concerning to invoke a truncated rule of reason analysis.

V.

A final priority for the FTC is considering how to incorporate behavioral economics principles into our enforcement decisions.

To be sure, orthodox Chicago School of economics has been at the forefront of antitrust analysis in the United States at least since the late 1970s. As I see it, there are two related fundamental premises that underlie that school of social thought. First, sellers generally act rationally, which is to say that they generally act to maximize profits, instead of engaging in predatory behavior which will be nullified by market corrections; and conversely, buyers generally act rationally to maximize bargains. Second, for that reason, markets, if not perfect, generally correct themselves rather quickly.

In contrast, behavioral economics is based on the view that sellers—and especially consumers—behave irrationally or, at the very least, do not always behave in a perfectly rational

[71] Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, In the Matter of Nine West Group Inc., FTC Docket No. C-3937 (May 6, 2008), *available at* http://www2.ftc.gov/os/caselist/9810386/080506order.pdf.

manner. That literature has been gathered together by, among others, Professor Maurice Stucke.[72] One of the most significant insights from the behavioral economics literature is the suggestion that, because consumers will behave irrationally—which is to say that they will make decisions based on factors other than price and quality—the government should engage in consumer protection efforts when there is a situation with less or imperfect competition rather than sitting back and waiting for a market to heal itself.[73]

In the wake of the recent financial crisis, behavioral economics has received considerable attention, just as many have questioned whether the Chicago School's teachings are still tenable.[74] Both Congress and the Supreme Court are currently grappling with the appropriate role of behavioral economics. In the *Jones v. Harris* case, the Supreme Court is considering whether an investor can challenge a fund's investment adviser for charging an excessive fee in

[72] *See, e.g.*, Maurice E. Stucke, *New Antitrust Realism*, GLOBAL COMPETITION POLICY (Jan. 2009); Maurice E. Stucke, *Behavioral Economics at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L. J. 513 (Spring 2007).

[73] *See Economics Roundtable*, GLOBAL COMPETITION REV., Mar. 2009 (Comments of Jorge Padilla) ("We know that the competitive process will protect consumers even if they are myopic and don't realize what's going on. So if there is lots of competition, we should worry less about consumer protection. If there is less competition, then consumer protection policies are key.").

[74] Former Chairman of the Federal Reserve Alan Greenspan, former Secretary of the Treasury Henry Paulson, and Judge Richard Posner are all Chicago School adherents that recently have called into question some of the fundamental assumptions underlying the Chicago School, including the rationality of business people. *See* Edmund L. Andrews, *Greenspan Concedes Error in Regulation*, N.Y. TIMES, Oct. 23, 2008, *available at* http://www.nytimes.com/2008/10/24/business/economy/24panel.html (Greenspan stating that he is in a state of "shock and disbelief" at what has happened and that he has found a "flaw" in his ideology and is "very distressed by that fact"); RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009).

the absence of fraud.[75] In essence, the case boils down to a fundamental disagreement over the ability of the market to regulate fees.

And over the last few months, Congress has been debating the creation of a new Consumer Financial Protection Agency to regulate the financial products. Under the administration's proposal, the agency will have the power to design "plain vanilla" financial products that must be offered to prospective borrowers and to discourage nonconforming products. As Judge Posner has observed, the administration's proposal for "plain vanilla" products—which the House Financial Services Committee dropped from its version of the legislation—is based on a belief "that consumers don't make rational decisions because they can't understand financial products."[76]

All of this leads to the question of what role behavioral economics should play in antitrust enforcement. I do not have any answers to this question, but I will say two things about the subject at this point: first, personally I am not in favor of government intervention to the same degree that some adherents of behavioral economics are; second, behavioral economics is

[75] Writing for a unanimous panel, Chief Judge Frank Easterbrook held that mutual fund shareholders could not sue their fund's investment adviser for charging excessive fees because those fees had been fully disclosed. *Jones v. Harris Assocs. L.P.*, 527 F.3d 630-35 (7th Cir. 2008). In so holding, Judge Easterbrook advanced a classical law-and-economics analysis that presumed a well-functioning market for investment advice, dismissed possibly irrational investor behavior, and questioned the judiciary's ability to regulate fees. In contrast, Judge Posner asserted in his dissent that Easterbrook's faith in the self-disciplining nature of market forces in the mutual fund industry is misplaced because "mutual funds are a component of the financial services industry, where abuses have been rampant." *Jones v. Harris Assocs. L.P.*, 537 F.3d 728, 729-33 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc). Finding an absence of healthy competition, Judge Posner took the view that market regulation was needed to correct for disordered behavior.

[76] Richard A. Posner, *Treating Financial Consumers as Consenting Adults*, WALL ST. J., July 22, 2009 (op-ed article). While acknowledging consumers' fallibility, Posner asserts that the administration's proposal goes too far by restricting consumer choice and discouraging suppliers from offering products that have benefited many consumers in the past.

something we can and should be grappling with at the FTC, particularly given our consumer protection mission.