



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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**ROUNDTABLE ON EVALUATION OF THE ACTIONS AND RESOURCES
OF COMPETITION AUTHORITIES**

-- Note the United States --

This note is submitted by the Delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 6-7 June 2007.

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1. Introduction

1. Through competition advocacy, the U.S. Department of Justice and the Federal Trade Commission (the Agencies) inform policy makers at all levels of government of the likely competitive effect of proposed regulation.¹ Competition advocacy often takes the form of letters to interested regulators, but also consists of formal submissions, testimony, *amicus curiae* briefs, studies, reports, and informal discussions. Given the substantial burdens that anticompetitive regulation can impose on consumers, advocacy is a cost-effective way to promote competition, requiring a small amount of resources relative to the Agencies' other tools.²

2. Since 1980, the FTC has issued 748 advocacies. Since 2001, the FTC has issued 116 comments. Several of these advocacies, especially those concerning regulation of the practice of law and, more recently, real estate brokerage, have been joint efforts between the Agencies.³ Over the last ten years DOJ filings before federal regulatory agencies alone have averaged nine per year.

¹ In this paper, we use the term regulation to refer to all government restraints, whether imposed by legislatures, regulatory agencies, or other bodies.

² A 1989 American Bar Association Report observed: "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 L.J. 43, 116 (1989).

³ On unauthorised practice of law restrictions, *see*: Letter from the Justice Department and the FTC to New York Assemblywoman Helen Weinstein (Jun. 21, 2006); letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005); letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorised Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (Jun. 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (filed May 25, 2004), Brief *Amicus Curiae* of the United States of America and the FTC in *On Review of ULP Advisory Opinion 2003-2* (filed July 28, 2003). On real estate brokerage regulation, *see*: Letter from FTC and Justice Department to Michigan State Sen. Alan Sanborn (Oct. 18, 2005); Letter from the FTC and the Justice Department to Governor Matt Blunt (May 23, 2005); Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005); Letter from the FTC and the Justice Department to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n. (Apr. 20, 2005). These advocacies are available at <http://www.usdoj.gov/atr/public/comments/comments.htm> and http://www.ftc.gov/opp/advocacy_date.shtml.

2. Evaluation of Advocacy Activities

3. The Agencies, both individually and jointly, have submitted competition advocacy⁴ filings supporting competition principles in a wide range of fora and to various state executives, including: national professional organisations; state legislatures, regulatory boards, and state and federal courts; and other federal agencies.

4. Other advocacy efforts include amicus briefs the Agencies file in court cases brought by others. For example, the Agencies jointly filed briefs with the U.S. Supreme Court in *Verizon Communications, Inc. v. Trinko*, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, *Illinois Tool Works, Inc. v. Independent Ink, Inc.* and *Texaco, Inc. v. Dagher* advocating positions beneficial to consumers and competition that in large part the Supreme Court adopted.⁵ The Agencies consistently evaluate the results of their amicus briefs to increase the effectiveness of their competition advocacy programs.

5. The Agencies assess the results of their efforts more generally by determining how the recipients perceive such advocacy and whether they adopt the Agencies' recommendations. Understanding the efficacy of particular competition advocacy filings can help the Agencies both improve their competition advocacy performance and determine whether continued pursuit of such advocacy is in the public interest.

6. Although there frequently is informal feedback from recipients of advocacy comments, the last previous formal attempt by the FTC to evaluate the effectiveness of its advocacy program was almost 20 years ago.⁶ To update understanding of the effectiveness of its advocacy program, in 2006, the FTC Office of Policy Planning surveyed advocacy recipients and others involved in the relevant decision making process for the period June 2001 – May 2006. As discussed in more detail below, overall the results are supportive of the FTC program and indicate that its advocacies have had a positive impact on policy making.

3. Role of Competition Advocacy

7. The Agencies are charged with promoting competition and the Agencies primarily carry out their mandate by enforcing the antitrust laws. A lesser-known tool, competition advocacy, is an important complement to enforcement because it focuses on government-imposed restraints that have anticompetitive effects. State-imposed restrictions on competition sometimes are necessary to correct market failures but also can be used to transfer wealth from consumers to a favored industry.⁷ State-imposed restrictions on

⁴ For some history of the FTC competition advocacy program and various views of the program see James C. Cooper, Paul A. Pautler, & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, ANTITRUST L.J., 72, 1091-1112 (2005).

⁵ Copies of the *Trinko*, *Empagran*, *Independent Ink* and *Dagher* amicus briefs can be found, respectively, at <http://www.usdoj.gov/atr/cases/f201000/201048.pdf>, <http://www.usdoj.gov/atr/cases/f202300/202397.pdf>, www.usdoj.gov/atr/cases/f210500/210544.htm and www.usdoj.gov/atr/cases/f211000/211046.htm.

⁶ See Arnold C. Celnick, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L. J. 379 (1989) (surveying recipients of advocacy comments from 1985-1987). In 1990, the FTC also surveyed recipients of advocacy comments received between 1987-1989.

⁷ See Cooper *et al.*, *supra* note 4, at 1099-1102 (discussing the economic theory of regulation and explaining how regulation is likely to benefit industry more than consumers); Maureen K. Ohlhausen,

competition are particularly pernicious because, unlike illegal cartels that must exist in the shadows, such restraints can exist in the open and compliance is enforced by the state.⁸

8. The economic theory of regulation posits that because of relatively high organisational and transaction costs, consumers will be disadvantaged relative to businesses in securing favorable regulation.⁹ This situation tends to result in regulations – such as unauthorised practice of law rules or minimum-service requirements for real estate brokers – that protect certain industries from competition at the expense of consumers. Thus, tasking a public entity with the responsibility of representing dispersed consumers is a way to correct this political market failure.¹⁰ Competition advocacy helps solve consumers' collective action problem by acting within the regulatory process to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on citizens.

9. By representing consumer interests in the regulatory process, the Agencies are able to affect outcomes in different ways. First, and most directly, a comment can persuade a decision-maker to oppose regulation by presenting a compelling case that it restricts competition more than is necessary to promote some consumer protection goal, and therefore is not in the public interest. At the same time, it can provide reasoned explanations that will help the decision-maker justify the decision to the public. Second, advocacy informs consumers about how a proposed regulation may affect them. To the extent that such information advances consumers' knowledge of the potential effects of a regulation, competition advocacy can move public opinion in a direction that is more favorable to competition.

10. Advocacy also is important because, due to antitrust immunities, it may sometimes be the only tool available to remedy anticompetitive government action. In the U.S., two doctrines are particularly important in this context. First, out of respect for federalism, restraints imposed directly by the state sovereign – a state legislature or a state supreme court, acting in a legislative capacity – are protected from antitrust challenge under the state action doctrine.¹¹ Further, the state action doctrine may shield actions

Identifying, Challenging, and Assigning Political Responsibility for State Legislation Restricting Competition, 2 COMP. POL. INT'L 151, 152 (2006) (same).

⁸ See Deborah Platt Majoras, Chairman, Federal Trade Commission, *A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program* (Feb. 8, 2005), at <http://www.ftc.gov/speeches/majoras/050208currebtopics.pdf>.

⁹ See, e.g., W. KIP VISCUSI, JOHN M. VERNON, & JOSEPH E. HARRINGTON, JR., *ECONOMICS OF REGULATION AND ANTITRUST*, 313-335 (3d ed. 2000).

¹⁰ As the 1989 "Kirkpatrick Report" observes:

The FTC's competition advocacy program permits it to accomplish for consumers what prohibitive costs prevent them from tackling individually. It is the potential for the FTC to undo governmentally imposed restraints that lessen consumer welfare, and to prevent their imposition, that warrants the program's continuance and expansion. 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 Federal Trade Commission, Antitrust and Trade Regulation Report, Vol. 56, Bureau of National Affairs Special Supplement (April 6, 1989) at S-23.

¹¹ See *Parker v. Brown*, 317 U.S. 341 (1943) (creating the state action doctrine); *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984) ("when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." (citations omitted)). The Court also extended this *ipso facto* exemption to a state supreme court acting in a legislative capacity. *Id.* at 568.

taken by subsidiary government entities and even by private in some circumstances.¹² Similarly, guided by First Amendment concerns, the *Noerr-Pennington* doctrine prevents agencies from bringing actions against parties for the anticompetitive effects of state action they urge.¹³

11. Public hearings and workshops also can be powerful policy development and advocacy tools. They allow the Agencies to bring together experts from business, government, law, and academia to engage in in-depth analyses of competition issues, including support for and criticism of the Agencies' previous actions and views. There are several recent examples of how the Agencies have deployed these tools to help evaluate the effectiveness of their enforcement programs.

12. In 2002, the Agencies held joint hearings entitled *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*.¹⁴ The Agencies heard testimony from distinguished panellists representing a wide range of interests and addressed a number of topics central to the antitrust/intellectual property debate, such as patent pooling and cross-licensing, and the use of intellectual property in industry standards. The Agencies utilised the hearings and testimony both to re-evaluate their own enforcement practices and to guide their future enforcement initiatives in this area. Lawyers and economists from both agencies closely examined how their enforcement policies might be improved and made even more transparent. The Agencies issued a report providing further guidance on these issues in April 2007.¹⁵

¹² See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) (“Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorisations.”); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 62-63 (1985) (public utility commission not the state itself); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (attorney fee schedule established by county bar association was not immune from antitrust liability). In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), the Court set out a two-part test for an entity claiming state action immunity from federal antitrust laws: it must demonstrate that its actions are (1) pursuant to a clearly articulated state policy intentionally displacing competition with an alternative regulatory scheme and (2) actively supervised by the state or a qualified government agency or official). See also FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> (analysing state action immunity doctrine).

¹³ The doctrine takes its name from the first two cases that the Supreme Court considered in this jurisprudential line. See *E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). For a detailed exposition of some of the issues presented by the *Noerr-Pennington* doctrine see FTC, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE (2006), available at: <http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf>.

¹⁴ More information about the Intellectual Property Hearings can be found on the FTC's website, available at <http://www.ftc.gov/opp/intellect/index.htm>.

¹⁵ U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, April 17, 2007, available at www.usdoj.gov/atr/public/hearings/ip/222655.htm. Press release available at www.usdoj.gov/atr/public/press_releases/2007/222684.htm.

13. The FTC held a workshop on health care competition in 2002, and in 2003, the Agencies held 27 days of joint hearings to examine the state of the health care marketplace and the role of competition and consumer protection in providing high-quality, cost-effective health care. The hearings gathered testimony from approximately 250 panellists, including representatives of various provider groups, insurers, employers, lawyers, patient advocates, and leading scholars on subjects ranging from antitrust and economics to health care quality and informed consent. The workshop and hearings resulted in a joint FTC/DOJ report, *Improving Health Care: A Dose of Competition*, released in July 2004, in which the Agencies distilled and analysed the information collected.¹⁶ The Agencies have used the knowledge gained through this process as a basis for additional competition advocacy in health care and to further enforcement initiatives.¹⁷

14. In February 2004, the Agencies conducted a three-day Merger Enforcement Workshop.¹⁸ The primary purpose of the public workshop was to assess the practical application and efficacy, as well as the viability, of the *1992 Horizontal Merger Guidelines*. The workshop allowed the Agencies to receive input from leading antitrust practitioners and economists and the business community on a wide range of topics that arise frequently in horizontal merger investigations. The workshop confirmed the analytical soundness of the Merger Guidelines and provided the Agencies with important suggestions and insights on how best to employ the Guidelines to ensure the most effective enforcement of our antitrust laws. The workshop ultimately resulted in the 2006 publication of the *Joint Commentary on the Horizontal Merger Guidelines*.¹⁹

15. Prompted by the substantial changes taking place in the real estate industry, as well as by consumers' interest in a competitive real estate marketplace, the FTC and DOJ co-hosted a public workshop in October 2005. The workshop provided an opportunity for stakeholders to discuss issues facing the industry, including, *inter alia*, the effect of various state regulations and private actions on emerging, non-traditional business models; the use of the Internet as an efficiency-enhancing tool; and empirical evidence on the state of competition in the real estate industry. In attendance were representatives from several real estate trade associations, real estate commissions from across the United States and Canada, and several different types of brokerage firms, including traditional, discount, and fee-

¹⁶ The report is available at <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>.

¹⁷ See, e.g., Comments of the Staff of the FTC to Representative Greg Aghazarian (Sept. 7, 2004), available at <http://www.ftc.gov/be/V040027.pdf>. What DOJ learned regarding state certificate of need laws, for instance, influenced its thinking in a recent enforcement action concerning two West Virginia hospitals that misused such a law to effectuate a horizontal market allocation. See DOJ Press Release, Justice Department Requires Two West Virginia Hospitals to End Illegal Market-Allocation Agreements: West Virginia Certificate-of-Need Authority Does Not Shield Agreements from Federal Antitrust Review (Mar. 21, 2005), available at http://www.usdoj.gov/atr/public/press_releases/2005/208209.htm.

¹⁸ Workshop materials and transcripts are available at <http://www.usdoj.gov/atr/public/workshops/meworkshop.htm> or <http://www.ftc.gov/bc/mergerenforce/index.html>.

¹⁹ The Federal Trade Commission and U.S. Department of Justice's *Joint Commentary on the Horizontal Merger Guidelines*, March 27, 2006, available at www.usdoj.gov/atr/public/guidelines/215247.htm. The DOJ pres release is available at www.usdoj.gov/atr/public/press_releases/2006/215260.htm.

for-service brokerage firms. In May 2007, the agencies issued a joint report, *COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY*.²⁰

16. The Agencies jointly sponsored a series of public hearings examining the competitive implications of single-firm conduct.²¹ The hearings began in June 2006 and concluded in May of 2007. These hearings examined whether and when specific types of single-firm conduct may violate Section 2 of the Sherman Act by harming competition and consumer welfare and when they are procompetitive and lawful. Understandings that have resonated throughout the hearings include: that mere size does not demonstrate harm to competition, that injury to a competitor does not demonstrate harm to competition, and a desire for clear and objective rules.

4. Particulars of the FTC Evaluation of its Advocacy Program

17. To better assess the role that advocacy plays in shaping regulatory outcomes, and thus the value of the program, the FTC's Office of Policy Planning surveyed some of those involved in the decision-making process to obtain their views on the quality and efficacy of advocacy efforts. In contrast to the case for enforcement actions, it is not always easy to ascertain the success of a particular advocacy and is often difficult to discern the extent of the Agencies' influence on policy-making.²² Even if a particular decision accords with the Agencies' recommendations, it may merely mean that the Agencies' views and those of the decision makers already were the same. By sampling the views of regulatory process participants, the survey can provide richer data than a simple comparison of regulatory outcomes with advocacy positions, which is not likely to give a complete view of the value of advocacy. A detailed survey can provide insight into how advocacy affects outcomes and how the decision-makers view advocacies.

4.1 Survey Overview

18. In January 2006, the FTC's Office of Policy Planning (OPP) – the FTC office with primary responsibility for competition advocacy – mailed 80 surveys to requestors of advocacies, those associated with a regulatory agency that had issued a regulation upon which the FTC commented, or the sponsor of a

²⁰ FEDERAL TRADE COMMISSION & U.S. DEPARTMENT OF JUSTICE, *COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (April 2007)*, available at <http://www.ftc.gov/reports/realestate/V050015.pdf> and <http://www.usdoj.gov/atr/public/reports/223094.pdf>.

²¹ For more information on the hearings, see <http://www.ftc.gov/os/sectiontwohearings/index.htm> and http://www.usdoj.gov/atr/public/hearings/single_firm/sfhearing.htm.

²² One notable exception was when California Governor Schwarzenegger cited the FTC's arguments about the potential competitive effects of the bill as a key reason he vetoed a bill to regulate pharmacy benefits managers. See Letter of Governor Arnold Schwarzenegger to Members of the California State Assembly Returning Assembly Bill 1960 Without Signature (Sept. 29, 2004), at http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf.

bill that the FTC advocated against.²³ OPP sent follow-up requests in May 2006 to those who did not respond and sent initial letters to those connected with advocacies issued after January 2006.

19. Ultimately OPP received 36 useable responses (a 45% response rate). Seven responses (19%) were from proponents of initiatives that the FTC opposed and ten (28%) were from representatives of agencies that had put a regulatory proposal out for open comment. The remainder was from those who had specifically solicited FTC comment. Most responses were related to advocacies sent between 2003-2005.²⁴ We received one response from the American Bar Association, ten responses from federal regulators, and the remainder from state legislators and regulators. Of the state responses, 23 concerned legislative proposals, one concerned a state bar opinion, and one concerned a state regulatory proposal. The advocacies related to the survey responses involved the following wide range of industries and issues:

- Unauthorised practice of law restrictions;
- Restrictions on wine and beer distribution, including franchise termination laws and bans on Internet direct shipment of wine;
- Regulation of pharmacy benefit managers and “any-willing-provider” provisions for retail pharmacies;
- Proposals to allow collective bargaining by physicians;
- Commercial practice restrictions in optometry and regulations concerning contact lens prescribing;
- Minimum-service requirements in real estate brokerage;
- Mortician licensing;
- Food and drug labeling and advertising issues involving the Food and Drug Administration;
- Prohibitions on below-cost sales of gasoline;
- Federal regulation of airline reservation systems;
- Federal regulation of electronic fund transfers;
- Proposals to create a do-not-email list.

20. The survey asked twelve questions, which focused broadly on the quality and the impact of the advocacy comments. The survey also asked about the role that press coverage played. Table 1 lists each question and tabulates responses.

4.2 Quality

21. Respondents’ views of the quality of competition advocacy generally were positive. Seventy-five percent of respondents either agreed or strongly agreed with the proposition that “the FTC’s comments presented sound analysis and clear reasoning.” Only 11 percent of respondents disagreed, and 15 percent

²³ Unlike the prior surveys, which sampled only advocacy recipients, this survey targeted both recipients and sponsors of policies that the FTC criticized. We did not survey courts about the effectiveness of amicus briefs as it likely would be inappropriate for a court to identify the relative influence that an amicus brief from the Agencies had on the outcome of a particular case.

²⁴ Responses by year of advocacy comment are: 2006 -1; 2005-13; 2004-10; 2003-7; 2002-3; 2001-1.

had no opinion. Similarly, 73 percent of respondents agreed or strongly agreed with the proposition that “FTC comments would be useful to decision-makers facing other relevant issues in the future.” Twelve percent disagreed or strongly disagreed with this proposition, and 17 percent had no opinion.

22. Of those respondents who did not find the FTC’s analysis well done or who did not agree that FTC comments would be useful to other policy-makers, all were proponents of policies that the FTC criticised.²⁵ At the same time, three of those who responded that the FTC’s work was sound and clear and two who responded that FTC comments would be useful to other policy-makers were proponents of proposals to which the FTC objected.²⁶ This suggests that respondents’ critiques of the FTC’s work product likely are based on divergent policy preferences rather than lack of sound analysis.

23. Another measure of the quality of FTC comments is the weight that policy makers place on the Agency’s analysis. Eighty percent of respondents either agreed or strongly agreed with the statement that “the fact that the comment came from the FTC caused me to give more consideration to the arguments presented.” Only 11 percent of respondents disagreed with this statement and 8 percent had no opinion. In some respects, this question measures policy makers’ *a priori* opinions of the quality of FTC work in general and perhaps the extent to which FTC analysis is objective. Importantly, even policy-makers who advocated positions contrary to the FTC’s analysis gave the FTC’s arguments additional consideration.²⁷ Of those who disagreed with this question, two were proponents of policies the FTC opposed and two were responding with respect to an FDA rulemaking, where they are obliged by law not to give certain comments more weight than others.²⁸

24. The extent to which advocacy comments provide “information or a perspective that previously was not considered” provides a measure of advocacy quality, but also measures the degree to which competition concerns enter the regulatory decision-making process absent advocacy. A majority of respondents (55 percent) agreed that the FTC’s perspective was unique, 22 percent of respondents disagreed, and the same percentage had no opinion. This finding suggests that the competitive analysis provided in advocacy comments may not have been considered but for the Agencies’ involvement.

²⁵ Missouri Governor Blunt, whom the Agencies urged to veto a minimum-service bill; North Dakota State Representative Nancy Brown, who sponsored a bill to regulate PBMs that the FTC staff criticised; Kansas State Senator Tom Holland, who sponsored a bill to prohibit below-cost sales of gasoline that we criticised; Michigan State Representative Charles LaSata, who sponsored a bill to prohibit below-cost sales of gasoline that the FTC staff criticised.

²⁶ Loretta DeHay, General Counsel of Texas Real Estate Commission, which had proposed a minimum-service regulation; California State Assemblyman Greg Aghzarian, who sponsored a bill that would have put a beer franchise law into place; Lish Whitson, Chair of ABA Task Force on Proposed Model Definition of the Practice of Law.

²⁷ Loretta DeHay, General Counsel of Texas Real Estate Commission, which had proposed a minimum-service regulation; California State Assemblyman Greg Aghzarian, who sponsored a bill that would have put a beer franchise law into place; Lish Whitson, Chair of ABA Task Force on Proposed Model Definition of the Practice of Law; North Dakota State Representative Nancy Brown, who sponsored a bill to regulate PBMs.

²⁸ Missouri Governor Blunt, whom the Agencies urged to veto a minimum-service bill; Kansas State Senator Tom Holland, who sponsored a bill to prohibit below-cost sales of gasoline; FDA Dockets concerning Transfatty acids.

However, in over 20 percent of the cases, parties other than the FTC appear to present arguments based on the competitive effects of a proposed regulation.

4.3 *Efficacy*

25. Advocacies appear to be effective at influencing policy. 53 percent of those who responded either agreed or strongly agreed that the “outcome was consistent with the FTC’s position” (Question 10) and 52 percent answered that “the FTC’s recommendations were adopted” in whole or in part (Question 2). Several respondents to Question 10 did not have an opinion because the bill was still pending at the time they received the survey. If these respondents are removed from the sample, 76 percent of survey respondents stated that the outcome was consistent with the FTC position.

26. The correlation between responses to questions 2 and 10 (.61) suggests that respondents thought of these questions differently. Further, several respondents answered that the ultimate outcome was consistent with the FTC’s position, but answered question 2 by stating either that the FTC position was not adopted or “other.” A closer examination of the responses reveals that some of these questions were answered inconsistently due to three reasons. First, in one case, the respondent disagreed that the FTC’s recommendations were taken, but answered the outcome was consistent with the FTC’s recommendations because the governor vetoed a bill the FTC opposed.²⁹ In two other cases, respondents were unable to provide a definitive answer with respect to whether the FTC’s recommendations, were taken or whether the outcome was consistent with the FTC’s recommendations because legislation that the FTC opposed had stalled.³⁰ These outcomes clearly were consistent with the FTC’s position. Another member of the sample answered that the FTC’s recommendations were not taken because the legislature had not passed a bill the FTC supported, but gave no opinion on whether the ultimate outcome was consistent with the FTC’s recommendations because the bill may be introduced in subsequent sessions.³¹ This outcome was contrary to the position put forward in the advocacy comment.

27. Recoding the responses to questions 2 and 10 for consistency with the FTC’s recommendations increases the FTC success rate: 61 percent of respondents could be considered to have responded that the FTC’s recommendations were adopted and 56 percent answered that the outcome was consistent with the FTC’s position.

28. As discussed above, one area that is difficult to measure is advocacy’s influence on the regulatory outcome. Although we can observe whether a policy outcome is consistent with our recommendation, we often do not know how our advocacy affected the outcome. For example, although a bill that would have banned below-cost sales of gasoline in Kansas stalled in committee, the sponsor of the bill said that the FTC’s advocacy played no role in its defeat.³²

29. Overall, however, the survey results appear to indicate that advocacies do influence ultimate outcomes. Ninety-four percent of respondents said that the FTC’s comments were considered during deliberations, and 54 percent of respondents – and 79 percent of those who had an opinion – answered that

²⁹ See response of California State Assemblyman Greg Aghzarian regarding California Assembly Bill 1960 that would have regulated pharmacy benefit managers.

³⁰ See Response of Director of Michigan’s Department of Labor and Economic Growth, David Hollister and California State Assemblyman Wesely Chesbro.

³¹ See Response of Virginia State Delegate Harry Purkey.

³² Response of Kansas State Representative Tom Holland.

the FTC influenced the ultimate outcome. Only 11 percent of respondents did not believe the FTC's comment had an influence on the ultimate outcome. More specifically, the survey also suggests that when an outcome is consistent with the FTC position, the advocacy likely played some role in achieving that outcome. Of those who responded that the outcome was consistent with FTC recommendations, 79 percent of respondents believed that the advocacy influenced the outcome.

4.4 Press Coverage

30. An important issue is the extent to which press coverage affected outcomes. One hypothesis that flows from the theory of competition advocacy is that publicity should be associated with more success. If regulators make decisions based on political calculations – rather than to maximise consumer welfare – the only way to change regulators' behavior is to impose political costs on them for making decisions that harm consumers. To the extent that publicity makes voters aware of an issue and decision-makers' positions on it, publicity can raise the costs of taking actions that harm consumers. The survey results suggest that most issues on which the FTC has commented have received press coverage. Of those respondents who could recall, 75 percent answered that the issue received press coverage. Further, when there was press coverage, 61 percent of respondents answered that the FTC's advocacy, in particular, received press coverage.

31. The data suggest that outcomes consistent with the FTC's position are positively associated with press coverage of the issue in general. Specifically, when a respondent answered that the issue received press coverage, outcomes were consistent with the FTC's position 58 percent of the time, compared to only 38 percent of the time when the issue received no press coverage. It is unclear, however, the extent to which press coverage of the FTC position in particular contributed to a favorable outcome. First, of those respondents who had an opinion, an overwhelming majority – 67 percent – disagreed with the statement that the FTC comment was influential due to press coverage of the FTC's involvement. Further, an examination of success rates sorted by press coverage of the FTC's comment also suggests that there is not a positive relationship between publicity of the FTC position and success. Of those issues that received press coverage, the FTC's comments receiving press coverage is associated with a lower percentage of favorable outcomes: when the FTC's position receives press coverage, outcomes were consistent with the FTC's position 55 percent of the time, but when there was no coverage of the FTC's comment, outcomes were favorable 71 percent of the time.

4.5 Conclusions and Future Work by the FTC

32. Because many factors influence regulatory decision-making, it is difficult to gauge the effectiveness of an advocacy program merely by viewing regulatory outcomes. Overall, the results of the FTC survey indicate that the policy makers consider advocacy comments in their decision-making and view them as well done and useful. Most importantly, advocacy appears to have an influence on policy outcomes. It also appears that press coverage plays a role in the success of an advocacy, though not necessarily press coverage of the advocacy comment itself.

33. Although the survey provided extremely useful information, it could be improved. First, with numerous issues to address during a session, it is likely to be difficult for a decision-maker to recall an advocacy that is several years old. Further, membership in state legislatures and regulatory bodies is fluid, so finding contact information for the relevant decision-makers after a legislative session ends can be difficult. These factors likely explain why the response rate was highest for recent advocacies. One way to assure a higher response rate and greater response accuracy would be to send out surveys on a rolling

basis within six-months of a comment. Another improvement on the current survey may be to solicit opinions regarding ways a comment could be improved to be more persuasive or accessible.

34. Useful future work also may be to develop a more detailed description of the settings for each comment. For example, the following factors may be related to the success of an advocacy: whether the comment was directed at state or federal decision-makers; whether it was a regulatory, legislative, or judicial body; the industry involved; whether there was a well organised interest group that shared the Agencies' opinion; or which party controlled the executive branch or held the majority in a legislature.³³

35. Finally, another interesting extension would be to study the market effects of successful advocacies. This could be done by comparing market outcomes (e.g., price, quality, output) in states that have adopted an anticompetitive regulation with those that have not. Although this approach can yield valuable evidence against certain restraints on competition, the necessary data are not always available.³⁴ An alternative or complementary approach might be a case study of a state that adopted a regulation against the recommendations of the Agencies that anecdotally describes how competition was affected by the state-imposed restraint.

³³ Cooper *et al.*, *supra* note 4, identify several factors that may affect the success of an advocacy.

³⁴ Ideally, one would be able to have a treatment group (*i.e.*, states adopting an anticompetitive restrictions) and a control group (*i.e.*, states that have not), and relevant data for both groups before and after the regulation went into effect.

Table 1
Summary of FTC Survey Responses

Question 1	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	
The FTC's recommendations were considered during deliberation.	19 52%	15 42%	1 3%	1 3%	0 0%	
Question 2	Wholly or Largely Adopted	Adopted in Part	Not Adopted	Other		
The FTC's recommendations were:	12 33%	7 19%	6 17%	11 31%		
Question 3	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	
The FTC's comments presented sound analysis and clear reasoning.	16 44%	11 31%	5 14%	4 11%	0 0%	
Question 4	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	No response
The FTC's comment influenced the ultimate outcome (e.g. whether a bill was enacted into law or whether a regulation was adopted).	6 17%	13 37%	11 31%	4 11%	0 0%	1
Question 5	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	No response
The FTC comment provided information or a perspective not previously considered.	4 11%	16 44%	8 22%	8 22%	0 0%	1
Question 6	Yes	No	Do Not Remember			No Response
The matter received press coverage.	24 68%	8 22%	3 8%			1
Question 7	Yes	No	Do Not Remember			

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Question 1	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	
The FTC's position on the matter received press coverage.	13 36%	14 39%	9 25%			
Question 8	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	
The FTC comment was influential due to the publicity and press coverage attending the FTC's involvement in the matter.	3 8%	4 11%	15 42%	13 36%	1 3%	
Question 9	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	
The fact that the comment came from the FTC caused me to give more consideration to the arguments presented.	8 22%	21 58%	3 8%	4 11%	0 0%	
Question 10	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	No response
The outcome of the matter was consistent with the FTC's recommendation.	5 14%	14 40%	12 34%	4 12%	0 0%	3
Question 11	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	
FTC comments would be useful to decision-makers facing other relevant issues in the future.	11 31%	15 42%	6 17%	2 6%	2 6%	
Question 12	Solicited at My Request	Solicited by Someone Else	Unsolicited			
The FTC Comment was:	20 56%	6 17%	10 23%			