



Maintaining a Culture of Competition—The Work Never Ends

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The views expressed in this presentation are solely mine and do not necessarily represent the views of the Federal Trade Commission.

Outline of Presentation



- Why Competition Policy Matters
- Public Awareness of Agency Activities
- Competition Advocacy

Competition Policy



- **Why Competition Policy Matters**

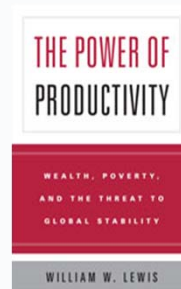
- In 2004, McKinsey Global Institute completed a 12-year study of 13 developing countries to find out what makes some countries rich and others poor?
 - ✦ **The answer: Productivity**
- What drives productivity? Study examined labor, capital formation, corporate governance, education, competition, etc.
 - ✦ **The most important factor: Competition**

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Competition Policy



- *“Economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can’t replace less efficient ones. Economic growth slows and nations remain poor.”*
- William Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability* (2004)



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Competition Policy



- **Two Primary Functions of FTC's Competition Mission**

- Enforcement of law against anticompetitive business behavior:
 - ✦ Anticompetitive agreements
 - ✦ Monopolization (or abuse of dominance)
 - ✦ Anticompetitive mergers
- Competition Advocacy:
 - ✦ In favor of regulatory policies that support competition and consumer welfare
 - ✦ Against regulatory policies that limit competition

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Creating a Competition Culture



- **Public awareness of competition activities**
 - Enforcement creates culture of competition through deterrence and awareness of law
 - Other agency activities promote awareness
- **Competition advocacy**

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Public Awareness



- **The FTC starts with the premise that:**
 - The FTC has a responsibility to be transparent
 - The public has a right to know
- **The FTC has an Office of Public Affairs (OPA), which is responsible for informing:**
 - Businesses about what the law requires of them
 - The legal community about how the FTC interprets the laws it enforces
 - Consumers about their rights and risks in the marketplace

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Public Awareness



- **Disseminate timely information on the FTC's goals and accomplishments that is accessible to the public**
- **Create consistent messages that explain what the Commission is doing and why**

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Public Awareness



- **Methods of communication include:**
 - News releases
 - Speeches
 - Consumer and business education
 - Congressional testimony

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Public Awareness



- **The FTC interacts with the media to advance its communications efforts.**
- **Interaction with the media has both active and reactive aspects:**

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Public Awareness



- **Active:**

- Issuing news releases
- Issuing brief “For Your Information” advisories
- Hosting press conferences
- Making officials available to speak (“media availabilities”)
- Direct outreach to reporters

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Public Awareness



- **Reactive**

- Responding to media inquiries
- Guiding reporters to authoritative sources of information
- Being responsive to the concerns of the public
- Finding opportunities in existing stories
- Responding to marketplace circumstances

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Public Awareness



- **Performing public affairs requires a high degree of credibility with the press**
 - Developing relationships and trust with relevant press
 - Ensuring the press is informed in an accurate and timely fashion
 - Selecting and training spokespeople to perform these functions well

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Public Awareness



- **Consider the audience, which includes:**
 - Consumers
 - Businesses
 - The legal community
 - Congress
- **Information should be appropriately targeted to each group**

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Public Awareness



- **Tools:**

- Create media contact lists
- Engage in direct contact with specific members of the press
- Use of the FTC website as the main tool for disseminating news and information
 - ✦ Many audiences monitor the website for up-to-date information
 - ✦ the web pages have been designed to reach a general audience using clear language, pertinent examples, and simple navigation
 - ✦ the website is the most cost-effective way of reaching the public

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Competition Advocacy



- **FTC Approach to Competition Advocacy**

- Competition should be restricted only when necessary to achieve some “countervailing procompetitive virtue” – such as protecting the public from significant harm – and such restrictions should be narrowly drawn
 - ✦ See *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986)

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Competition Advocacy



“Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.”

International Competition Network
“Advocacy and Competition Policy”
Report for the ICN Conference, Naples Italy 2002

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Competition Advocacy



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

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Competition Advocacy



- **When business urges the government to distort competition through regulation**
 - Government enforces the restriction
 - Effects can be just as severe, or worse because restraint is written into law
- **For companies, it is a low-risk, low-cost way to suppress competition**

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Competition Advocacy



- **Anticompetitive laws, regulations, and policies can substantially burden competition and consumers.**
- **It may be hard for dispersed consumers to stop or remove anticompetitive policies, versus more concentrated interest groups.**
- **In U.S., antitrust exemptions may exist for certain conduct relating to states' powers and lobbying for government for action.**

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Competition Advocacy



- The competition authority may be the only government body with the expertise and interest to recognize the problem and address it.
- Law enforcement is not always feasible.

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Competition Advocacy



- **Competition advocacy fills the gap**
 - Informs government—and citizens—of true costs and benefits of restrictions
 - Expert agency analysis may overcome these problems and influence decision making in favor of competition and consumers
 - Effective competition advocacy requires empirical evidence and persuasive logical arguments
 - Political process can then decide if restriction is worth it
 - Advocacy is efficient because it requires only a small amount of resources, relative to other tools like litigation

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Competition Advocacy



- **Section of Section 6 of the FTC Act**
 - Allows the FTC to “gather and compile information”
- **FTC Advocacy Tools**
 - Letters, comments, testimony
 - ✦ Specific invitation
 - ✦ General invitation for public comments
 - informal discussions
 - ✦ Legislators, executive branch officials, regulators
 - Amicus curiae briefs
 - ✦ Cases raising significant competition issues
 - Reports, studies
 - ✦ Often based on FTC workshops on cutting-edge topics

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Competition Advocacy



- **Additional tools: OECD Toolkit**
 - The OECD's Competition Assessment Toolkit “helps governments to eliminate barriers to competition by providing a method for identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives.”
 - ✦ Website:
http://www.oecd.org/document/48/0,3746,en_2649_40381664_42454576_1_1_1_1,00.html

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Competition Advocacy



- **Competition advocacy can be efficient**
 - **Letters, comments, testimony, amicus briefs**
 - × ~ 1-5 attorneys, economists + management, Commission review = 1 month+
 - **Reports, studies**
 - × ~ 5-15 attorneys, economists + management, Commission review = 6 months+
 - **Litigation**
 - × Compare with reports and studies: as many or more attorneys and economists, but for 1-2 years or longer.

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Competition Advocacy



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

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Competition Advocacy: Example



- Optometry practice was dominated by traditional practitioners
- Chain optical firms entered
- State regulatory bodies often dominated by traditional practitioners
- Boards passed restrictions that limited use of:
 - Advertising
 - Trade names
 - Commercial locations
 - Branch offices
 - Employment of optometrists by optical firms



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Competition Advocacy: Example



- **FTC conducted studies showing:**
 - Prices higher in states with restrictions
 - Quality is unaffected
- **Law enforcement cases brought where possible**
- **FTC advocacy campaign before state legislatures**
 - Used evidence of studies to highlight costs of restrictions and lack of benefits
 - Testimony to state legislatures
 - Letters to legislators
 - Publicity and transparency

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Competition Advocacy: Effectiveness



- **Basic Cost-Benefit Analysis**

- “Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission’s entire budget.”
 - × *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, Reprinted in 58 Antitrust Law Journal 43, 94 (1989)
- FTC advocacy activities have historically used only around 10-12 individuals and about 1-4% (\$2 million FY 2005) of the FTC’s budget
 - × Deborah Platt Majoras, *A Dose of Our Own Medicine: Applying a Cost / Benefit Analysis to the FTC’s Advocacy Program* (2005)

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Competition Advocacy: Effectiveness



- **2006 Advocacy Survey**

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

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Competition Advocacy: Effectiveness



• 2006 Advocacy Survey

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

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Competition Advocacy: Effectiveness



• Challenges to Measuring Effectiveness

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

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Competition Advocacy: Effectiveness



- **2011 FTC Performance and Accountability Report**

- Performance Measure 2.3.3, number of competition advocacy comments and amicus briefs
 - ✦ Target: 6
 - ✦ Actual: 16 (15 comments; 1 amicus brief)
- Performance Measure 2.3.4, survey responses finding advocacy to be “useful”
 - ✦ Target: 50%
 - ✦ Actual: 100% (based on 5 responses)
 - ✦ Target percentage recognizes comments critiquing a recipient’s proposed action may not be assessed positively

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Competition Advocacy: Effectiveness



- **Direct Evidence – Advocacies**

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

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Competition Advocacy: Effectiveness



• Direct Evidence – Reports

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

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Conclusions



• Why does the work never end?

- Enforcement can create deterrence, but there are always businesses that may test the limits of the law.
- Governments will continue to regulate, and will need reminders that regulations can impact competition negatively.
- The law will continue to develop and business and consumers will need to know about the changes.

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FTC Resources



- FTC, Advocacy Filings by Date, http://www.ftc.gov/opp/advocacy_date.shtm
- FTC, Advocacy Filings by Subject, http://www.ftc.gov/opp/advocacy_subject.shtm
- FTC, Amicus Briefs, <http://www.ftc.gov/ogc/briefs.shtm>
- FTC, Reports, <http://www.ftc.gov/opp/reports.shtm>
- FTC, Conferences and Workshops, <http://www.ftc.gov/ftc/workshops.shtm>
- FTC, Performance and Accountability Report, Fiscal Year 2011, <http://www.ftc.gov/opp/gpra/2011parreport.pdf>

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Additional Resources



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

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Resources



- **Websites:**

- www.ftc.gov
- www.justice.gov/atr
- www.internationalcompetitionnetwork.org
- www.oecd.org
- www.unctad.org

- **Contacts:**

- Christopher Grengs, Office of Policy Planning, cgrengs@ftc.gov
- Andrew Heimert, Office of International Affairs, aheimert@ftc.gov