



# **The Federal Trade Commission at 100: Into Our 2<sup>nd</sup> Century**

**The Continuing Pursuit of Better Practices  
January 2009**

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**A Report by Federal Trade Commission Chairman William E. Kovacic**

This Report represents the views of FTC Chairman Kovacic and does not necessarily represent the views of the Commission or any individual Commissioner.

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FTC Chairman William E. Kovacic

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## EXECUTIVE SUMMARY

### PART 1: INTRODUCTION BY CHAIRMAN KOVACIC

A few years from now, the FTC will reach the one hundredth anniversary of the statute that gave it life. How well is the agency fulfilling the destiny that Congress foresaw for it in 1914? What type of institution should the FTC aspire to be when the agency's second century begins in 2014?

Over the past seven months, the FTC has conducted a self-assessment to consider these and other basic questions about the agency's future direction. Two aims motivated this initiative. The first is to ask what we must do to continue the valuable work that the agency performs today and to identify steps we must take to do still better in the future. The focus of this exercise is an agency that is one of the great success stories in the modern history of public administration.

The progress of the Federal Trade Commission in its modern era has built heavily upon the willingness of its people to assess their work critically and explore possibilities for improvement. The FTC at 100 self-assessment is the latest element of that tradition, and the exercise has yielded valuable insights about strengthening the agency. Several areas stand out. The inquiry has helped identify what resources – personnel, facilities, equipment – the FTC will need to perform its duties in the future. Nothing is more vital to the success of the Commission than its human capital. A second result is to suggest how the FTC might improve its approach for choosing strategies for exercising its powers. No task of administration is more important than selecting priorities. A third product of this self-assessment has been to identify how the FTC can strengthen its processes for implementing its programs. The manner in which an agency organizes its operations deeply shapes the quality of its substantive initiatives and affects the costs that firms bear in complying with the agency's commands. Finally, the inquiry has pointed to how the FTC can better fulfill its duties by improving links with other government bodies and nongovernment organizations.

The consultations for this project have identified seven general characteristics of good administrative practice that the FTC should strive to achieve in its work in the coming years. The successful competition agency of the future is one that:

- Formulates and clearly communicates well-specified goals to its staff and to external constituencies.
- Establishes and refines internal planning mechanisms that devise a strategy and programs for accomplishing its goals.
- Employs a problem-solving approach that uses the full range of the agency's policy tools to correct apparent market or government failures that impede the attainment of competition and consumer protection objectives.

- Creates internal quality control systems that test the soundness of proposed initiatives.
- Emphasizes the recruitment and retention of skilled administrative staff, attorneys, and economists.
- Makes regular, substantial capital investments in building knowledge, in developing relationships with collateral public agencies and academic research centers at home and abroad, and in improving physical infrastructure assets.
- Establishes processes for the routine evaluation of programs, agency organization, and procedures.

In these and related measures, the FTC will prosper if it embraces an ethic of continuous self-assessment and improvement.

## **PART 2: INSTITUTIONAL FOUNDATIONS OF SUCCESSFUL FTC PERFORMANCE**

This self-study dwelled extensively on the basic question of what criteria serve to separate good performance from adequate or weak performance. The definition of standards is fundamental to the study of the performance of the Commission or any other public body, yet the need clearly to specify criteria frequently gets less attention than it deserves. One of the central aims of this self-study was to identify institutional features that beget good substantive outcomes over time.

### **I. Agency Mission**

#### **A. Clearly Articulating the Mission**

A fundamental characteristic of a good institution is the clarity with which it understands its purpose and defines its “mission.” The FTC’s mission has two dimensions: one related to the substance of policy and the other related to the process by which policy is formed. The substantive dimension consists of the public policy goals that the Commission should accomplish on behalf of the American people. The process dimension involves the means that Congress placed at the Commission’s disposal to address economic policy issues.

As a threshold matter, agency leaders must clearly articulate the agency mission so that staff and external constituencies have a firm grasp of what the agency is trying to achieve. In its most recent strategic plan, the FTC has defined its mission in the following manner: “To prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding

of the competitive process; and to accomplish these missions without unduly burdening legitimate business activity.”<sup>1</sup>

There appears to be widespread understanding that the FTC’s current mission focuses on consumers and that the improvement of consumer welfare is the proper objective of the agency’s competition and consumer protection work. The improvement of market outcomes for consumers, and not the status of specific firms or collections of enterprises, is seen the reason to challenge fraud, deceit, and related forms of unfair practices, and to police anticompetitive mergers and other practices that improperly suppress rivalry in the marketplace. This perspective appears to enjoy broad support within the community of competition policy and consumer protection agencies.

A vital aspect of the FTC’s mission is to exercise the unique mix of institutional capabilities Congress has entrusted to it. The FTC’s powers are genuinely multidimensional. The Commission best fulfills its destiny when it uses a problem-solving approach that applies the most effective mix of the agency’s portfolio of policy instruments, which include law enforcement, administrative adjudication, advocacy, the collection of data, the preparation of reports, and rulemaking. A certifying characteristic of good performance for the Commission is its demonstrated capacity to employ this full panoply of capabilities to address important public policy issues.

## **B. Measuring Outcomes Rather than Outputs**

In addition to a clearly articulated mission, there should be a close nexus between the mission and outcomes for the public that can be measured. That is, a mission ideally should be defined in a manner that lends itself to meaningful measurement of whether the agency carries it out successfully. In the case of a competition or consumer protection agency, it should develop a mission that is focused on outcomes for the public (for example, preserving competitive markets or preventing fraud), rather than agency inputs or outputs (for example, number of staff employed or cases filed). It is typically easier to identify and measure government agencies’ outputs rather than outcomes. Thus, agency leaders should articulate a mission that lends itself to developing outputs that enjoy a close nexus with desired outcomes. Beyond emphasizing outcomes rather than outputs, a mission that focuses on *measurable* outcomes has several advantages for an agency’s pursuit of its goals.

## **C. Internal and External Support for the Mission**

Finally, for an agency to thrive, its mission should enjoy support from key internal and external constituencies over time. For the FTC, one core constituency is its own staff of administrative professionals, attorneys, and economists. The Commission derives significant advantages from building widespread internal agreement upon and endorsement of its mission. Among other benefits, such support enables managers to

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<sup>1</sup> FTC, STRATEGIC PLAN: FISCAL YEARS 2006-2011, at 1 (2006), *available at* <http://www.ftc.gov/opp/gpra/spfy06fy11.pdf>.

economize on resources. When the FTC's staff understands and embraces the agency's stated aims, managers need spend less time to create incentives for staff to pursue the mission and can reduce the effort devoted to monitoring whether staff's efforts are consistent with the FTC's mission.

Beyond mobilizing its own employees, an agency also must enjoy support for its mission among external constituencies. Lack of external support for the mission can erode the perceived legitimacy of the agency's individual actions, cause Congress to withdraw part of its jurisdiction, and, in extreme circumstances, call into question its continued existence. In addition, although support for a mission is crucial to any agency, it is important to distinguish between support for a mission among internal and external constituencies over time, on the one hand, and unanimous support for specific agency actions, on the other. The former is necessary for a successful agency; the latter is not.

## **II. Agency Structure**

The structure of an administrative agency such as the FTC deeply influences the skill with which it carries out its responsibilities. The structure and organization of a competition and consumer protection agency can affect the performance of its priorities directly, for example, by having operational units dedicated to bringing specific types of cases or examining individual economic sectors, and indirectly, for example, by facilitating communication and coordination among agency components or having sufficient flexibility to address changes in rapidly transforming markets.

Consumer protection and competition agencies around the world have a variety of structural designs. Some agencies have only competition or consumer protection enforcement authority. Others, like the FTC, combine the functions to meet a broader mission of protecting the marketplace for consumers. Among agencies with both functions, some organize their work along industry lines, while others divide along competition and consumer protection lines. Some agencies have a single commissioner or director, while others are led by a collegial body.

### **A. Current Agency Design**

Since the early 1970s, the FTC has had a bureau structure that includes the Bureau of Competition ("BC"), Bureau of Consumer Protection ("BCP"), and Bureau of Economics ("BE"). On the whole, the FTC's structure of operating units has worked well. External consultations revealed many instances in which other countries have emulated major elements of this structure. Further, the FTC's administrative structure and its organization of bureaus have proven to be highly adaptable and flexible. New divisions or other subunits can be, and have been, created in response to changes in marketplace conditions or perceived agency needs.

Consider two examples of how the agency has, in recent years, altered its structure to better address its mission. In 2007, the agency altered BCP to form the Division of Privacy and Identity Protection out of the Division of Financial Practices,

which has enabled the FTC to better address consumer-related financial-privacy concerns, while also improving the focus on the other issues that remained in the Division of Financial Practices. In 2008, the Bureau of Economics developed a research unit to oversee BE research that will have impacts across all areas of enforcement.

## **B. Looking Ahead: Significant Issues Involving the FTC's Structure and Operations**

The FTC's self-study consultations demonstrated that organizational adaptability and an ethic of continuous institutional improvement are major characteristics of good agency performance. Several structural attributes of the FTC affect its success. One involves the integration of competition and consumer protection missions within a single agency. A related issue, which the dual mission especially implicates, is communication and coordination across agency components. This is particularly important for the nonenforcement activities of the agency, which can be effective tools to shape policies across practice disciplines. Another structural issue is the placement of economists within the agency. A further significant structural issue is the proper role of administrative adjudication in the agency.

Shared authority is a common condition of the FTC's competition and consumer protection missions. There are other federal agencies that address aspects of these missions, such as the Department of Justice ("DOJ"), the Food and Drug Administration, and the Federal Reserve Board. However, the dual missions that fall under the "unfair or deceptive acts or practices" and "unfair methods of competition" standards within the FTC Act make this agency particularly well suited to address the interplay between consumer protection and competition. The Commission's capacity to meld expertise in economics, competition, and consumer protection is a conscious element of its institutional design and a major reason for its existence.

A longstanding concern of students of public administration is the skill with which the individual components of an institution share information with each other and otherwise coordinate their activities. The need to achieve effective intra-agency information flows and cooperation is a matter of particular importance for the FTC. Among other reasons, this is a function of the Commission's dual-purpose mission and its portfolio of research capabilities and other policy instruments that may be used by multiple agency units. Whether the agency is consistent in communicating the central tenets of the competition and consumer protection missions to agency staff and to outside stakeholders is an indicator of its likely success in achieving its mission.

Panelists and other commentators discussed ways to integrate the agency's disciplines by means of nonenforcement resources. Panelists and commentators have observed that the FTC can improve its performance by building stronger links among the bureaus and other offices, such as between competition and consumer protection staff, as well as by more completely integrating economists in all aspects of the agency's work.<sup>2</sup>

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<sup>2</sup> Competition agencies routinely include economists on their staffs, and there are different ways to incorporate economists' input into agency decision making. Until recently, the FTC's Bureau of

Some panelists suggested that a policy office could play a useful role in improving these links and disseminating important insights throughout the agency.

Finally, under Section 5(b) of the FTC Act, the Commission may challenge unfair or deceptive acts or practices or unfair methods of competition through administrative adjudication. Roundtable panelists shared a variety of opinions about the administrative adjudicatory process, and many suggested modifications to modernize and make the system more effective. Former General Counsel Stephen Calkins observed that elimination of the administrative adjudication feature would undermine the Commission's special role. Calkins explained: "[O]ne of the alleged comparative advantages of the Commission is that it can be an adjudicative body. And I do think that it is – it's important for this agency to get it right, to make it work, because it's one of the reasons we have a Federal Trade Commission."<sup>3</sup>

Other panelists suggested that federal courts are the proper forum for the FTC to pursue cases, as the process of having the FTC both issue the complaint and then become the appellate tribunal in the outcome creates an appearance problem. Another criticism of FTC administrative adjudication involves the time it takes to complete the proceedings. Panelists also discussed ALJ expertise in handling the types of administrative cases before them.<sup>4</sup> Looking ahead, the agency should determine what role Part III adjudication should play in advancing competition and consumer protection law enforcement and policy. In particular, the agency should consider when administrative adjudication is most appropriate, as well as ways to improve the adjudicatory process.<sup>5</sup>

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Economics had a relatively unique position vis-à-vis economists at many other competition and consumer protection agencies in that the BE Director reports directly to the Chairman of the agency and makes recommendations directly to the full Commission. As a result, economist input into enforcement and other decisions is not merely subsumed into recommendations controlled by attorneys or case handlers, as is the case at many other agencies. More recently, a number of competition agencies have been adopting the BE organizational model and giving the office of the chief economist a direct reporting line to the agencies' top leadership.

<sup>3</sup> Calkins, 7/30 DC Tr. at 105-06. Throughout this report, citations to "Tr." refer to the various FTC at 100 roundtable transcripts. Participants are identified by last name; roundtables are identified by location.

The agendas, biographies, transcripts, and other information relating to the FTC at 100 roundtables are available on the FTC's website at <http://www.ftc.gov/ftc/workshops/ftc100/index.shtm>. In addition, Appendix 1 to this report provides the identity and affiliation of the roundtable participants. Appendix 2 provides a list of the agencies, organizations, and individuals participating in FTC at 100 external consultations.

<sup>4</sup> It bears noting, however, that the ALJ selection process is dictated by government-wide requirements and not by FTC rules or policy.

<sup>5</sup> Presently, the rules governing Part III proceedings are in the process of being revised to address concerns over the speed of certain types of cases. The proposed revised rules and comments are available at <http://www.ftc.gov/os/2008/09/P072104nprmt3.pdf>.

### **III. Agency Resources**

The FTC's ability to achieve its mission depends in significant part on its allocation and management of personnel, capital, and information resources.

#### **A. Personnel**

How the FTC approaches recruiting, training, and retention of talented and competent personnel bears significantly on the agency's ultimate success. Given the evolution of competition and consumer protection policy, and changes in the tools of economic analysis, any agency self-assessment should consider how the agency can recruit and retain well-trained personnel in relevant areas of expertise, as well as how the agency trains and educates its existing staff to remain current in such areas. External consultations yielded several recommendations on how to improve the recruiting, training, and retention of skilled professionals at the FTC. For example, to offset the government/private sector pay disparity and recruit talented professionals, many panelists suggested that the FTC employ a combination of first-rate training and ample opportunities for staff to apply their skills and knowledge in interesting and innovative legal and policy areas.

#### **B. Capital Resources**

In several respects, an agency's budget dictates the deployment of its resources and thus dictates its ability to achieve its mission. A well-planned and effective budget policy, including allocations within that budget, is essential for the success of any agency. The FTC's budget must be able to strike a balance that both reflects agency priorities, as expressed to staff and external stakeholders, and is sufficiently flexible to respond to circumstances that require a shifting of budgetary priorities. For example, allocation of BCP resources among the many tools with which it pursues its mission – including enforcement actions, rulemaking, consumer and business education, policy R&D efforts, and promotion of industry self-regulation – has shifted at different times to meet different agency needs.

#### **C. Information**

The Commission needs information to detect problems, investigate them, and then, through litigation or otherwise, address them. The FTC's effective use of personnel and capital resources is largely dependent on the information the agency is able to obtain regarding marketplace conduct, mergers and other transactions, and legal, economic, and technological developments.

The agency, through its Consumer Response Center, receives and responds to thousands of consumer and business complaints or inquiries each week. Complaints are made available to FTC staff and other law enforcement agencies in the U.S. and worldwide through the FTC's Consumer Sentinel Network, a secure online database that includes not only complaints received by the FTC, but also by other selected government

agencies and nongovernmental entities. On the competition side, the agency gathers information about transactions and ongoing conduct in the marketplace primarily through specific statutory reporting requirements, including those established by the Hart-Scott-Rodino Act. The FTC also gathers information to detect and investigate possible law violations through complaints from, and inquiries directed to, competitors, suppliers, and consumers.

Further, in both the competition and consumer protection areas, the agency gathers relevant industry and marketplace information by convening conferences, workshops, and hearings to address current and emerging issues in these areas. Such events have become an important means through which the Commission and its staff identify problems and develop appropriate responses. The agency also obtains information from other competition and consumer protection agencies, both foreign and domestic.

Of course, like other enforcement agencies, the FTC also has enforcement-related authority to issue compulsory process, such as subpoenas and civil investigative demands. Apart from a particular investigation, however, the FTC also has unique powers to obtain information – in both competition and consumer protection matters – pursuant to Section 6(b) of the FTC Act, which enables it to conduct wide-ranging economic studies that do not have a specific law enforcement purpose. Whether the FTC uses its 6(b) authority in a particular context depends on whether there are important policy topics that require investigation that could not be done with publicly available or voluntarily submitted data.

#### **IV. The Agency's Relationships**

The FTC has important relationships with several types of outside entities. These relationships impact the agency's performance in various ways, and each requires a slightly different approach by the FTC to maintain the relationship. Some relationships – such as those with Congress, consumers, and industry – involve interaction and communication regarding how the agency pursues its mission. Some relationships – such as those with domestic and international agencies – involve coordination in law enforcement efforts. Some relationships – such as those with domestic and international agencies and the academy – involve efforts by the FTC to research, develop, and promote sound competition and consumer protection policy. In any case, the FTC can benefit from, and improve its effectiveness with, input from each of these stakeholders.

*Congress.* As an independent agency created by Congress, the FTC has an important relationship with Congress as an institution and with individual members of Congress. Primarily through its Office of Congressional Relations, the FTC works closely with congressional committees and subcommittees, individual members, and their staffs, responding to inquiries regarding competition and consumer protection matters, testifying before congressional panels on FTC policies and programs, and preparing reports for Congress.

A number of panelists stressed the importance of the FTC managing carefully its relationship with Congress. One way to envision the FTC's work is that its activities involve either accumulating political capital or spending political capital. In choosing new programs, the agency must be attentive to the balance of its political capital account. An agency that chronically runs major deficits is likely headed for trouble.

*Other Federal Agencies.* Due to the wide breadth of the FTC's activities and overlapping jurisdiction in certain substantive areas of the law, the FTC has numerous policy and enforcement relationships with other federal government entities, including the Department of Justice, the federal banking regulators, the Consumer Product Safety Commission, and the United States Postal Inspection Service. For example, relations with other federal agencies are important to the FTC's consumer protection mission because of the overlapping jurisdiction that exists in certain areas (for example, the shared jurisdiction over consumer credit with the federal banking agencies) and the statutory law enforcement relationships in others (for example, the FTC's dependence on the DOJ to pursue civil penalty cases).

In the competition area, the FTC's most central interagency relationship on the federal level is with the DOJ Antitrust Division. The FTC and DOJ have significant overlapping jurisdiction with respect to antitrust enforcement and policy. For example, the agencies share antitrust jurisdiction over most mergers and business conduct. Given these overlaps, the two agencies have developed premerger and enforcement clearance and communication procedures to avoid duplicative enforcement in competition matters. For those within the ambit of both the FTC's and DOJ's enforcement jurisdictions, comity and consistency of views between the agencies is important because it provides certainty for consumers and market participants. Also, it can allow the agencies to operate more efficiently. Thus, as the FTC works to improve its performance, it should consider how to improve its relationship with the DOJ to enhance the clarity, transparency, and consistency of antitrust enforcement.

Through its advocacy program, the FTC advises other federal agencies across a wide array of areas, such as food labeling, lending practices, and energy regulation. FTC staff also frequently consults informally with other federal agency staff. Through these formal and informal consultations, the agency has been able not only to coordinate efforts with these agencies but also to influence their work – and secure assistance in the FTC's work – in ways that benefit consumers and competition.

*State Agencies.* As with federal agencies, the FTC engages with state enforcers and other state institutions to address overlapping issues in competition and consumer protection enforcement, as well as policy matters. Comity with state antitrust and consumer protection agencies has become increasingly important given state involvement in many federal enforcement actions. Today, the FTC often conducts investigations jointly with state attorneys general because both have an interest in the particular merger or conduct at issue. On broad policy matters, the FTC often advises state legislatures and agencies through advocacy filings.

*International Enforcement Agencies.* Building and maintaining strong bilateral relationships with foreign agencies is a critical element of the FTC's programs, including its enforcement program. Given the many important FTC cases involving foreign parties, foreign-located evidence or assets, or parallel review with other agencies, effective cooperation with agencies outside the United States is a necessity. Strong personal relationships facilitate case cooperation and dialogue, making contact at a personal level an important factor in international cooperation.

The Commission's engagement with foreign governments on policy matters serves to inform the policy of other nations. By describing how the U.S. agencies approach various issues, the FTC hopes to provide useful information for other nations to consider as they make their own choices regarding market-based or regulation-based approaches to policy questions. In addition, given the importance of the exchange of ideas and strategies, these interactions with foreign counterparts can inform an agency's domestic agenda and practices.

Another important way in which the Commission works with foreign counterparts is by providing technical assistance to both younger and more mature competition and consumer protection agencies. Technical assistance projects and programs can allow an agency to improve its relationships with foreign counterparts and provide a significant opportunity to engage in the type of export and import activity that promotes cooperation and convergence.

*Consumers and Consumer Groups.* Consumers are, of course, one of the key constituencies for the FTC. How the agency relates to consumers – either directly or through various consumer and advocacy groups – is thus a significant factor in the agency's ultimate success. The agency's direct interactions with consumers are largely limited to receiving complaints from consumers and issuing educational materials for use by consumers. A significant means for relating to consumers is therefore through interactions with various consumer groups.

Panelists stressed the importance of ensuring that the means by which the FTC provides its consumer information remain up-to-date. This means understanding the different gradations or demographics of consumers, the information media on which they rely, and preparing the FTC message such that it can be understood in the appropriate format for the targeted consumer.

In addition to getting its message out to consumers, the FTC must consider its (two-way) interactions with consumers and consumer groups. Panelists discussed how greater transparency of agency decision making and the inclusion of interested groups in the process would help in making FTC actions more effective. Panelists suggested that having liaisons within the agency to facilitate communication with consumer groups and industry would be a sensible step toward building relationships with these constituencies.

*Market Participants.* Industry stakeholders rely on the FTC for information and guidance on competition and consumer protection enforcement, regulation, and policy.

In turn, the agency can benefit in its work from the insight, expertise, and cooperation of industry groups. Panelists discussed whether the FTC offers useful guidance, whether it gathers industry views and suggestions – for example, through public workshops and hearings – and whether it coordinates effectively with industry, where appropriate.

*Academia.* Finally, several panelists stressed the importance of reaching out to the academic community to spur research in areas of interest to the FTC, which can expand the agency’s research resources as well as benefit the participating academics. Although outside academics have been useful in certain agency initiatives, panelists expressed some concern that FTC issues are either little known or underappreciated by the larger academic community. Thus, research and work that is valuable for purposes of the agency’s enforcement efforts may not be appreciated by all members of the academic research community.

## **V. Agency Leadership, Strategic Planning, and Policy R&D**

Agency leadership must motivate the staff to pursue the agency’s mission, both by clearly communicating that mission to staff and by listening to staff’s input on how best to achieve the mission. Strategic planning allows the agency to identify competition and consumer protection problems on the horizon, as well as determine which tool or tools with which to address such problems. Policy R&D is a necessary foundation for tackling the challenging competition and consumer protection policy issues that the agency has been tasked with addressing. The FTC’s efforts in these three areas – leadership, planning, and research – significantly impact the agency’s ability to deploy its resources in an effective manner.

### **A. Leadership**

Effective leadership at the top of the agency sets the tone for how the staff executes the agency’s mission. Effective leadership involves not only understanding the agency mission, structure, and the interests of key stakeholders, but also communicating the mission and priorities to agency staff to motivate them to carry out the mission of the agency effectively over time. Agency leadership also affects employee morale, which often dictates agency success.

### **B. Strategic Planning**

Strategic planning at a government agency involves more than just a determination of how insightfully to identify and understand problems that arise, but also a determination of how to pick the right tool or right collection of tools (or even the right sequencing of tools) to use to address such problems. In the case of the FTC, the agency must decide, for example, whether to issue guidelines, bring a case, create rules, or hold public consultations to address the various competition and consumer protection problems that it faces.

External consultations confirmed the importance of strategic planning to the success of this, or any other, agency. Former Chairman Timothy Muris explained that it is insufficient to have a core mission and to define it well; the agency needs a strategy to implement it. That strategy requires continual new thinking and innovation.<sup>6</sup> In addition to innovation, roundtable panelists identified policy continuity as another important goal of strategic planning. Former General Counsel Debra Valentine framed the relevant inquiry as follows: “How can you keep an acute sense of the past and the evolving trends so that you can try to keep some strategies going through time, notwithstanding the inevitable impulse of the next gang to really want to leave their mark?”<sup>7</sup> U.K. Office of Fair Trading (“OFT”) Chief Executive John Fingleton explained that the governance structure of the OFT provides “a certain type of continuity,” as the OFT’s Board is responsible for setting long-term strategy for the agency, rather than making individual enforcement and policy decisions, which is left to the Executive.<sup>8</sup>

The goal of policy continuity, however, does not imply inflexibility in strategic planning. Several panelists emphasized the importance of building flexibility into any strategic planning efforts. The Chairman of the U.K. Competition Commission, Peter Freeman, characterized the need for flexibility as follows: “[A]s the Duke of Wellington has said, ‘time spent on reconnaissance was seldom wasted.’ Also, I think he said words to the effect of ‘all plans collapse on first contact with the enemy.’”<sup>9</sup> Strategic planning, Freeman continued, “cannot be too rigid and it cannot be too binding. [B]ut everything we do should take place . . . against a background of priorities and policy consciousness.”<sup>10</sup>

The Commission’s strategic planning efforts include specific enforcement and policy agendas brought to the agency by Chairmen, Commissioners, and senior staff; the strategic planning done pursuant to the Government Performance and Results Act and various other reporting requirements; and senior staff retreats that the Commission has held for more than a decade. Other examples of strategic planning include “policy review sessions,” which were used in the 1970s and 1980s to permit the Commission members and staff to discuss significant policy issues. The Commission recently revived this custom in 2008 to discuss how the Commission might address various issues concerning the financial crisis.

Recommendations for future FTC strategic planning offered by roundtable panelists addressed, among other things, the level at which such planning should take place. Former BCP Director Jodie Bernstein recommended that the FTC engage in agency-wide – not just bureau-by-bureau – strategic planning because it would “energize” both BCP and BC by letting each bureau see what the other’s ideas are. This

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<sup>6</sup> Muris, 7/29 DC Tr. at 20-21.

<sup>7</sup> Valentine, London Tr. at 85.

<sup>8</sup> Fingleton, London Tr. at 86.

<sup>9</sup> Freeman, London Tr. at 80.

<sup>10</sup> *Id.* at 83-84.

would address the concern Bernstein has with the Balkanization of the agency into bureaus or even divisions that do not communicate with each other.<sup>11</sup> Further, several panelists stressed the importance of including outside entities – including state agencies, congressional staff, consumer groups, and industry – in the planning process in order to anticipate where the next controversy will be, get relevant information from key stakeholders, and gauge how much support the agency will have to take action in a given area.

External consultations revealed several examples of strategic planning undertaken at other competition and consumer protection agencies. For example, the U.K. OFT has a dedicated “strategy and planning team,” which is engaged in all parts of strategic planning development and implementation to help ensure consistency across the agency. The European Commission’s Directorate General for Competition implements its strategic planning in part through the use of a peer review system designed to foster intra-agency debate concerning particular matters. The Canadian Competition Bureau recently has engaged in a process that involves an environmental scan – including a review of sector and marketplace developments to identify potential problems relevant to each of its branches – that feeds directly into the agency’s agenda setting.

### **C. Policy Research and Development**

Policy research and development plays an important role at the FTC. An agency that intends to be thoughtful and to consider its policy actions seriously must have some ability to analyze the trade-offs inherent in any policy choice. That capability can be developed through, among other means, academic-style research, information gathering and report writing, and conferences and workshops that bring together elements from business, government, consumer representatives, and the bar to discuss issues related to competition and consumer protection policy and law.

The FTC has a mandate to undertake certain forms of research based on Section 6 of the FTC Act and the historical report-writing activity of its predecessor entity, the Bureau of Corporations. That mandate differentiates the FTC from most other antitrust or consumer protection agencies in the world. From its inception, the FTC carried on a general investigative function that complemented its law enforcement activities. The results of the investigations were compiled in reports that were intended to shed light on various questionable business practices of the day. That activity was the precursor of what is now thought of as research and policy R&D at the FTC.

#### **1. Goals Served by Policy R&D**

Apart from the primary purpose of answering specific research questions, the FTC, including its several components, undertakes research for a number of reasons. Research and policy R&D is undertaken to improve agency decision making in specific areas, such as law enforcement, rulemaking, and competition and consumer protection

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<sup>11</sup> Bernstein, 7/29 DC Tr. at 43.

advocacy. Research activities often allow the agency to develop ways to better analyze problems that can be used in antitrust or consumer policy settings. Doing such analysis in a law enforcement or litigation environment often is difficult or impossible; doing it in a research environment is thus necessary.

Research topics often allow the agency to gain a better understanding of industries, including those, such as energy and health care, which feature prominently in the agency's law enforcement agenda. For example, the agency's gasoline and diesel price monitoring project allows the agency to track changes over time in price-cost margins and to notice anomalies in prices in various cities or regions. Although checking for such anomalies is now routine, this effort initially was a policy R&D project. Other R&D projects are designed to gain information about industries that the agency expects to be important in its future enforcement and policy efforts.

Policy R&D efforts at the FTC also serve the important purpose of scanning the horizon for future competition and consumer problem areas. The agency gathers relevant industry and marketplace information by convening conferences, workshops, and hearings to address current and emerging competition and consumer protection issues. Such events have become an important means through which the Commission and its staff identify problems and develop appropriate responses.

## **2. Setting a Research Agenda**

Given the prominent role of policy research and development at the FTC, having a systematic means for identifying and planning relevant research is imperative. Historically, ideas for research topics from within the FTC have come from many sources. Several studies have been essentially staff-initiated; many have been projects promoted by the agency Chairman or the Commission; and others have been sponsored by multiple bureaus. It is often difficult to identify a single source of a research idea. Often the specific ideas come from staff, but with encouragement from agency leaders who may have identified general areas for investigation. Other times, ideas for studies follow from previous projects. In other instances, congressional interest, if not a direct congressional request, might instigate a study.

FTC research ideas have come from a variety of sources. During the past few years, a large portion of the research work has been generated by presidential or congressional requests for examinations of various competition and consumer protection issues. Beyond these external requests, much recent FTC research has been initiated or developed by the agency's Chairs, by non-Chairman Commissioners, and, as has been true throughout the history of the FTC, by the staff.

There are several steps in the research process, including defining the broad topic areas of interest for research, generating interesting, policy-relevant, and achievable ideas within a topic area, and producing and monitoring the research. In the recent past, these tasks largely have been handled within each economic or legal organization within the agency. In principle, these tasks could be accomplished either in such a decentralized

manner or through a more systematic, centralized process involving the simultaneous collection of research ideas from multiple sources, coordination of topic choices, and then monitoring of output.

Some roundtable panelists discussed the policy R&D process and suggested rather different approaches. Former BE Director Michael Salinger, for instance, argued that combining the agency's policy groups might be sensible, but that the Bureau of Economics research work should remain independent of the legal policy shops and that the research process should remain decentralized.<sup>12</sup> In contrast, two former heads of legal policy shops, Susan DeSanti<sup>13</sup> and Joseph Kattan,<sup>14</sup> favored a more centralized approach under which ideas from a wide variety of sources would be vetted early and production would be centrally controlled through an agency-wide committee. The goals of such an approach would be better to control the chosen topics – for example, to select projects that relate more closely with current enforcement or advocacy priorities – and to coordinate resource deployment across several relatively autonomous groups.

## **VI. Deployment of Agency Resources**

### **A. General Issues Involving Resource Allocation**

An agency's allocation of its scarce resources undoubtedly is one of the most significant determinants of its ultimate success. Once it identifies a desired outcome – for example, a reduction in the number of deceptive weight-loss claims – a successful agency will make optimal use of its tools to achieve that outcome. The FTC has several tools available to pursue its mission. These tools include law enforcement, first and foremost; however, they also include many other options – such as advocacy, education, policy research and development, and rulemaking – that can be more effective than enforcement in many circumstances. Resource allocation, then, is to a large extent a matter of picking the right tool or tools from the FTC's existing arsenal – or adding new tools to that arsenal – to best address the matter at hand.

### **B. The FTC's Many Resource Deployment Options**

#### **1. Law Enforcement/Litigation**

The FTC's law enforcement authority encompasses both consumer protection and antitrust. In allocating resources to its law enforcement efforts, the agency should first consider the goals that underlie such efforts. Among the most important goals of the FTC's law enforcement mission are providing guidance to industry, developing sound law, and obtaining consumer redress. Deterrence of unlawful conduct, however, is the lodestar of the agency's law enforcement efforts.

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<sup>12</sup> Salinger, 7/29 DC Tr. at 168-69.

<sup>13</sup> DeSanti, 7/29 DC Tr. at 128-31, 153.

<sup>14</sup> Kattan, 7/29 DC Tr. at 167-68.

Perhaps the most important consideration in evaluating the enforcement efforts of the FTC is its case selection. Such evaluation should consider where the agency decides to focus its enforcement efforts. For example, should that focus be where potential consumer benefits and/or redress are largest? Should the focus be on areas involving the greatest amount of commerce? How much of the agency's enforcement efforts should be devoted to developing or clarifying competition and consumer protection doctrine?

Another relevant factor in selecting cases is the litigation risk attendant to pursuing any given case. In the various external consultations, there was a fairly uniform view that the agency ought to be less risk-averse in bringing cases. Other considerations in evaluating the agency's law enforcement efforts include the amount and type of case generation in which the agency engages, the appropriate number of cases to pursue at any given time, and the proper forum – administrative or judicial – for bringing cases.

## **2. Policy Research and Development**

As discussed above, policy research and development at the FTC includes a broad array of activities designed to inform the agency's pursuit of its competition and consumer protection missions. These activities include workshops, hearings, studies, reports, and ex post assessments of agency initiatives and actions. Consultations with various outside parties and representatives from other competition and consumer protection agencies identified significant support for the FTC's allocation of resources to its policy R&D efforts.

## **3. Advocacy**

As an important complement to its law enforcement mission, the FTC engages in competition and consumer protection advocacy before other policymakers, including state legislatures, regulatory boards, and officials; state and federal courts; other federal agencies; and professional organizations, such as bar associations. In response to requests or where public comments are sought, the FTC issues advocacy letters, comments, and amicus briefs, providing policymakers with a framework to analyze competition and consumer protection issues raised by pending governmental actions or ongoing judicial disputes. Advocacy can play a particularly important role in addressing governmentally imposed restraints on competition, where other tools may be unavailable. There was strong support among those consulted for the FTC's advocacy efforts.

## **4. Rulemaking**

The Commission's strongest policymaking tool, in addition to litigation, is rulemaking. In 1975, Congress granted the Commission express authority to issue substantive rules, referred to as Magnuson-Moss rulemaking, which requires more complex procedures than those needed for rulemaking pursuant to the Administrative Procedure Act ("APA"). During the past 15 years, 17 rules have been promulgated by the Commission, and several existing rules have been amended. In addition, three new rulemaking proceedings are in progress. Most new rules have been enacted based on

specific statutes that authorized the use of APA rulemaking procedures. Also during the past 15 years, the Commission has made regulatory review and reform a high priority. Recognizing that over time some rules may become obsolete or unnecessary or simply need updating in light of new technologies and marketing techniques, the FTC initiated a program to review its rules at least once every 10 years.

## **5. Guidelines, Guides, and Advisory Opinions**

To promote transparency and encourage compliance with the law, the FTC issues guidelines, typically in conjunction with the DOJ Antitrust Division, to provide guidance regarding the application of the U.S. antitrust laws. These guidelines explain competition policy in specific areas, such as horizontal merger review, collaborations among competitors, licensing of intellectual property, and health care.

A central issue involving agency guidelines is one of timing – including the appropriate times at which to issue and, if necessary, update any given set of guidelines. Former BC Project Director for Intellectual Property Hillary Greene identified the “central tension” in formulating guidelines as follows: waiting until there is a sufficient consensus in any particular area of the law, on the one hand, and providing certainty and guidance in such area of the law, on the other hand.<sup>15</sup>

Industry guides, which are published in the Code of Federal Regulations, or C.F.R., have become a vehicle to inform businesses how the Commission would apply Section 5 of the FTC Act in specific situations. Industry guides are advisory in nature – that is, they are not an independent basis for enforcement actions, and violations do not give rise to civil penalties. However, they serve to inform businesses about practices that could be considered unfair or deceptive. Industry guides typically focus on particular problematic practices in advertising, marketing, or labeling. Promulgation of guides does not require formal rulemaking proceedings, but, in recent years, the Commission has solicited public comments, and may hold a hearing or workshop, before adopting or substantively amending guides. Like rules, industry guides are subject to review every 10 years.

The FTC’s efforts at providing guidance to industry also include advisory opinions concerning proposed conduct provided in response to requests for advice. On the competition side, BC staff render so-called advisory opinions, which often involve issues in the health care field. On the consumer protection side, BCP staff render so-called staff opinion letters, which typically address proposed interpretations of FTC rules and regulations. Commission advisory opinions, which are issued relatively infrequently, are intended to address substantial or novel questions of fact or law or subjects of significant interest.

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<sup>15</sup> Greene, Boston Tr. at 31.

## **6. Consumer and Business Education**

During the past 20 years, educating consumers and businesses about their rights and responsibilities in the marketplace has become an increasingly important part of fulfilling the agency's consumer protection mission. Enforcement efforts to combat fraud are enhanced by informing consumers how to recognize and avoid becoming victims of fraudulent marketing practices. For example, educating consumers not to respond to emails that "phish" for financial account information can be a more effective tool to combat this practice than bringing successive enforcement actions against numerous perpetrators. Educating businesses about their legal obligations under a variety of FTC rules enhances compliance, and to that end, the Commission issues clear, plain-language guides – in print and on video – that pose numerous examples of required or prohibited conduct. External consultations yielded widespread expressions of support for the agency's consumer and business education efforts in the consumer protection area.

## **7. Encouragement of Appropriate Industry Self-Regulation**

Meaningful self-regulation is an important complement to the Commission's law enforcement efforts – particularly in the area of deceptive marketing practices. For example, the program administered by the National Advertising Division/National Advertising Review Council arm of the Council of Better Business Bureaus has worked well to obviate the need for Commission action in some instances. In cases where the process does not reach a successful conclusion, the matter is referred to the Commission with much of the underlying investigative work already accomplished. In addition, self-regulatory programs have been helpful in areas – such as food and entertainment products – where the Commission has advocated seller restraint in promotions directed to children.

## **8. Partnership and Outreach with Domestic Agencies**

Another important tool available to the FTC is outreach to domestic agencies. The Commission's engagement with domestic agencies involves efforts on both the policy level, including advocacy, as well as enforcement cooperation, facilitated by the Commission's broad authority to share with domestic law enforcement agencies nonpublic information otherwise subject to prohibitions on disclosure. Enforcement cooperation can facilitate the Commission's own investigation, where a federal or state agency shares expertise or provides investigative assistance. It also can leverage the Commission's limited resources, by enlisting other agencies in undertaking efforts that advance the FTC's mission. The FTC often seeks to maximize its enforcement impact on the consumer protection side by coordinating "sweeps" – multiple legal actions filed at or near the same time by multiple authorities. Cooperation with domestic (and foreign) enforcement agencies is an integral component of these sweeps.

## **9. International Partnerships and Outreach**

The FTC recognizes that a competition and consumer protection agency cannot limit its activity or vision to its own borders, and thus devotes significant efforts to

international activity, coordinated by its Office of International Affairs. As with the Commission's dealings with domestic agencies, these efforts include engagement on policy initiatives and practices as well as enforcement cooperation. An important component of the policy engagement, mentioned above, is the FTC's technical assistance program.

To obtain the most results from its engagement with foreign enforcers, both in bilateral and multilateral contexts, an agency with an effective international program develops short-, medium-, and long-term strategies that guide participation in these fora, with a clear idea about when the agency wants to take a leadership role and when the agency plans to take a more passive or "importing" role. The best-designed program identifies areas for teaching, and those for learning, recognizing that the two roles are not mutually exclusive.

On the enforcement side, the Commission's work with its foreign counterparts facilitates its ability to obtain meaningful and timely cooperation from foreign counterparts for FTC-generated investigations and litigation matters. Another critical dimension is the agency's ability to influence the enforcement agenda and priorities of a foreign agency through notifications, consultations, and other bilateral mechanisms. A third dimension is the FTC's capacity to provide assistance, in appropriate cases, to foreign authorities when they request the FTC's assistance or refer complaints involving U.S. businesses.

### **PART 3: MEASURING THE EFFECTIVENESS OF FTC ACTIONS**

#### **VII. Measuring Agency Effectiveness**

When assessing the characteristics of agency output, the FTC should stay focused on how its actions impact consumer welfare. Unlike agencies that produce a readily measurable output directly to consumers, however, the vast majority of FTC actions are not aimed at consumers directly, but rather toward parties – typically business and sometimes government – in an effort to stop conduct and mergers that threaten to harm consumers.<sup>16</sup> For example, the FTC sues businesses for taking actions that violate the consumer protection and competition laws and engages in advocacy with governments to discourage anticompetitive regulation. Thus, there is an indirect link between FTC action and changes in consumer welfare: the FTC helps consumers primarily through its ability to reduce the occurrence of conduct that violates consumer protection or antitrust laws or otherwise reduces consumer welfare.

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<sup>16</sup> Consumer education is an exception to this characterization. Unlike in the case of antitrust violations, consumers can take actions to reduce the probability of becoming a victim of fraud and deception. Thus, targeting messages directly to consumers to inform them of these actions can reduce the occurrence of fraud and deception.

## **A. Direct Measurements of Welfare**

Given widespread acceptance of the FTC's consumer-focused mission, direct measurement of the increase in consumer welfare as a result of FTC actions would be ideal. As a practical matter, direct measurement of welfare effects entails comparing price and output in the relevant markets before and after the FTC action. For example, consumers pay higher prices and purchase fewer goods or services than they otherwise would in the case of an antitrust violation. As a result, consumers suffer direct financial losses, and also forego the satisfaction they could have received from additional purchases, had the price been set at the competitive level. Of course, events unassociated with FTC actions also affect cost and demand conditions and, hence, observed prices. To isolate welfare changes resulting from the FTC's competition and consumer protection actions, it is important to control for other factors that also affect market outcomes and that occurred during a similar time frame.

Several panelists addressed the promise and problems associated with direct measurement of market outcomes after FTC action in the context of merger retrospectives. Because mergers make up a large portion of the FTC's competition caseload, the ability to evaluate the effect of mergers on consumers would go a long way toward direct evaluation of the FTC's competition program. Panelists, however, spoke extensively about the limitations of such studies, identifying significant methodological and data constraints. Proponents of merger retrospectives argued that they need not all be price-focused, state-of-the-art empirical projects, but rather they can be useful if they provide replicable measures of postmerger performance on any of several dimensions.

## **B. Proxies for Direct Welfare Measurements**

When direct measurement is not feasible, it is necessary to look for proxies for the impact of FTC actions on consumers, such as the outcome of enforcement actions; the direct impact, deterrent effect, and precedential value of these actions; the FTC's intellectual leadership; the guidance and transparency provided by the FTC to businesses and consumers; and the burdens the FTC places on industry.

Some proxies have a closer nexus with welfare changes than others. The raw number of cases brought is at best a limited metric to evaluate FTC enforcement actions. Further, a focus on the number or percentage of wins is likely to be similarly uninformative – a large number of wins, for example, is likely to signal that the Commission is bringing only easy cases and that more problematic conduct remains underdeterred. Rather, evaluators should pay attention to the extent to which the FTC is bringing the proper mix of cases to maximize its positive impact on consumer welfare. This mix will include cases in large markets that vindicate substantial consumer interests in the short run and also include cases that are likely to have large, long-run deterrent and precedential value. Determining the optimal mix of cases to use as a benchmark for the actual mix of cases is likely to be somewhat subjective.

Empirical study of the relationship between FTC enforcement (and other) actions and market outcomes may guide this endeavor. For example, evaluating the deterrence effects of enforcement actions targeting anticompetitive conduct may yield useful information to guide future enforcement efforts. Because consumers can take actions to reduce the incidence of fraud and deception, consumer education can be an effective adjunct to enforcement in promoting consumer protection. Evaluating the success of consumer education in reducing fraud and deception may be difficult in every circumstance, but a few carefully designed studies may provide valuable information.

FTC actions also should be evaluated to determine whether they demonstrate intellectual leadership in the areas of competition and consumer protection policy. Commission cases can lead the way in developing legal norms. Further, it is important for the FTC to engage in competition and consumer protection policy R&D to calibrate the fit between FTC actions and consumer welfare and to inform courts and policymakers in their decisions. The extent to which courts, policymakers, and academics follow the FTC's lead in these areas is an important evaluative criterion. Educating the public and policymakers on the benefits of competition also is important. Thus, any evaluation should measure the extent to which consumers use FTC competition-promoting materials and the extent to which FTC advocacy influences policy outcomes.

The external community values guidance from the FTC, and the agency should strive to make decisions more transparent to improve policy determinations. The FTC can provide such guidance and transparency through guidelines, industry guides, advocacy, speeches, and other domestic and international outreach that inform the relevant external constituencies about the FTC's current thinking in certain areas. Any evaluation of FTC actions should ask whether the FTC adequately publicizes its actions and whether it effectively conveys policy norms to industry, the courts, and other constituencies.

Evaluations of FTC output also should measure the extent to which FTC actions place unreasonable costs on the business community, both in terms of money and time. Such measurement will inform Congress, industry, and the public and also likely will enhance internal incentives to reduce burdens the FTC places on businesses. When developing a metric, it is important to develop appropriate benchmarks for both financial and time burdens, which are likely to vary by action. For example, it should consider the appropriate time to process investigations or from filing an administrative complaint until a final Commission decision.

### **C. Responsiveness to Core Constituencies**

Finally, being open and responsive to core constituencies' concerns is crucial. Absent external support for its mission over time, the FTC cannot operate effectively. At the same time, it is important to distinguish between cultivating external support for the mission by demonstrating a willingness to take seriously constituency concerns, and attempting to garner unanimous support for every agency action. Further, the agency should be cognizant of the potential tension between intellectual leadership and

responsiveness to constituency demands. When these circumstances arise, the FTC can ameliorate this tension by engaging in outreach to develop support from its constituencies for its policies.

#### **PART 4: CHAIRMAN’S RECOMMENDATIONS**

The report concludes with a set of recommendations for consideration by future leaders of the FTC. The recommendations correspond to the review of the institutional arrangements by which the Commission performs its responsibilities (discussed in Chapters I-VI), as well as the means for measuring the effectiveness of the agency’s performance (discussed in Chapter VII). It is hoped that the process used for this self-assessment not only has illuminated ways to improve the Federal Trade Commission but also has supplied a template for future self-assessment exercises.

## PART 1: INTRODUCTION BY CHAIRMAN KOVACIC

### The Rationale for a Self-Assessment

Albert Cummins was one of the chief sponsors of the Federal Trade Commission Act of 1914. In the weeks before the passage of the legislation that would create the Federal Trade Commission (“FTC” or “Commission”), Cummins predicted that the new agency “will be found to be the most efficient protection to the people of the United States that Congress has ever given the people by way of a regulation of commerce.”<sup>1</sup> A few years from now, the FTC will reach the one hundredth anniversary of the statute that gave it life. How well is the agency fulfilling the destiny that Congress foresaw for it in 1914? What type of institution should the Commission aspire to be when the agency’s second century begins in 2014?

Over the past seven months, the FTC has conducted a self-assessment to consider these and other basic questions about the agency’s future direction. Two aims motivated this initiative. The first is to ask what the FTC must do to continue the valuable work that the agency performs today and to identify steps the agency must take to do still better in the future. The focus of this exercise is an agency that is one of the great success stories in the modern history of public administration. In the late 1960s, the Commission’s performance attracted scalding criticism that raised doubts about its continued existence.<sup>2</sup> Forty years later, the agency stands in the front ranks of the world’s competition policy and consumer protection institutions.

None of this happened by chance. One crucial ingredient was the tireless commitment and strenuous labors of our attorneys, economists, and administrative professionals. Another was superior leadership that saw the way to greatness. Yet even more significant was the acceptance, in the face of crisis and in moments of success, of a culture that understood that the development of a superior institution demanded a willingness to ask the hardest questions about the agency’s purposes and performance. Good policy results are not suspended in air. They emerge from and rest upon a structure of institutional arrangements that are the product of statutory design and administrative implementation.<sup>3</sup> These arrangements encompass the organizational form of the FTC, formal rules that govern its operation, and informal customs or norms of behavior that

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<sup>1</sup> 51 CONG. REC. 14,770 (1914).

<sup>2</sup> This episode is recounted in William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: An Historical Perspective*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 63 (Robert J. Mackay et al. eds., 1987).

<sup>3</sup> Recent decades have featured major contributions to the literature that focus on the role of institutions in shaping economic policy results. Much of this work has been developed by Douglass North and other scholars associated with what is known as the “New Institutional Economics” (NIE). See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

have developed within the agency.<sup>4</sup> The FTC learned long ago that it is impossible to deliver the equivalent of broadband quality policy content over dial-up institutions.

The urgency to revisit fundamental questions about the possibilities for institutional improvements stems from several sources. The policymaking challenges to the Commission grow ever more demanding. In carrying out its competition and consumer protection responsibilities, the agency confronts some of the most difficult issues of economic policy. The FTC's success in a variety of initiatives – whether in protecting the privacy of the home through the Do-Not-Call Rule, striking down unnecessary barriers to rivalry in professional services, preparing reports that shape public debate or legislative deliberations about intellectual property, or contributing to the formation of networks that help promote international agreement on superior techniques – has created high expectations about the Commission's capacity to respond to these challenges. The agency's experience in undertaking these and other measures has shown that the pursuit of sensible policy solutions requires an unrelenting search for better practices.

A further motivation to revisit basic questions is the example of our foreign counterparts. The world today is a vastly different place than it was when the FTC opened its doors nearly one hundred years ago. To be effective, an agency must account for the ever-growing international dimension of commerce. The intensification of cross-border economic integration has deeply affected consumer and business behavior and significantly influenced how the Commission and its foreign counterparts seek to accomplish their competition and consumer protection missions.

This is an unparalleled era of institutional experimentation and reform in the fields of competition policy and consumer protection. We have much to learn from what happens outside our borders. Within the past decade, some of our more experienced counterparts – for example, the Australian Competition and Consumer Commission (“ACCC”), the Competition Commission and the Office of Fair Trading (“OFT”) in the United Kingdom, the Directorate for Competition (“DG Comp”) and the Directorate for Health and Consumer Affairs (“DG SANCO”) in the European Commission (“EC”), the Conseil de la Concurrence in France, the Cabinet Office in Japan, and the Competition Bureau of Canada – have undertaken a basic examination of key elements of their authority, organization, and operations.

For example, in the consumer protection area, two of the most striking examples are Australia's efforts to restructure its entire consumer policy framework and Japan's ongoing examination and reorganization of governmental consumer protection

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<sup>4</sup> “Norms” are consensus views about how members of an organization or group ought to behave. Robert Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 218 (1994). Unlike commands embodied in formal legal rules, norms consist of customs that members of a group develop voluntarily and follow. See Lawrence E. Mitchell, *Understanding Norms*, 49 U. TORONTO L.J. 177 (1999) (providing survey of modern legal and economic literature on norms). The role of norms in determining how public officials enforce legal commands is examined in Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

institutions. In Australia, the Productivity Commission, an independent research and advisory body, released a comprehensive report in May 2008 – based on nearly two years of consultations and analysis – on ways to improve the consumer policy framework to empower consumers, harmonize and coordinate consumer policy across Australian federal, state, and territorial jurisdictions, and avoid unnecessary duplication and increases in regulation.<sup>5</sup> The Productivity Commission recommended the introduction of a single generic consumer law applying across Australia as well as the transfer of regulatory responsibility in several areas, including consumer credit, to Australia’s federal regulators. In October, the Council of Australian Governments (“COAG”) adopted many of the Productivity Commission’s recommendations, and implementation is underway.<sup>6</sup> In Japan, following a spate of consumer food safety incidents, a governmental panel delivered a report to the Prime Minister in June 2008 that recommended transferring overall responsibility for consumer protection matters from several different agencies to a new consumer agency that will come under the auspices of the Cabinet Office.<sup>7</sup> Since then, the government submitted a bill to the Japanese Diet to establish a new Consumer Affairs Agency, which is currently under review.

Over the past decade or so, several of the member states of the European Union (“EU”) have undertaken major programs of institutional renewal. In the United Kingdom, the government engaged in extensive legal reform starting with the 1998 Competition Act, which introduced EC-style competition prohibitions into U.K. law, and the 2002 Enterprise Act, which created, among other things, a new governance structure for the OFT involving a board comprised of executive and nonexecutive directors. Following these legal changes, the OFT established a unit to engage in market studies and advocacy in 2002. In 2006, informed by outside evaluations, the OFT dismantled the division of labor along competition and consumer lines into sectoral market-facing areas, supported by specialist teams such as strategy and planning and evaluation, and internal back-of-house areas. As the result of an extensive review of its competition policy system, France soon will implement structural reforms that will establish a single competition authority from the two French agencies that currently share competition policy responsibilities.

The European Commission’s DG Comp also has engaged in a major restructuring effort in this decade. Several losses in merger cases in 2002 inspired DG Comp to examine itself and undertake widespread reforms. The changes focused on defining activity by market concepts and industry knowledge, introducing more transparency and reducing hierarchy, providing for more flexibility in staff movement around the agency,

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<sup>5</sup> The Productivity Commission’s report is available at <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>. A summary of the key points is available at <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport/keypoints>.

<sup>6</sup> A communiqué dated October 2, 2008 from the COAG describing these developments is available at [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-10-02/index.cfm#regulat](http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm#regulat).

<sup>7</sup> Consultation with Cabinet Office of Japan, Sept. 19, 2008. *See also* Policy Speech by Prime Minister of Japan Taro Aso to the 170<sup>th</sup> Session of the Diet (Sept. 29, 2008), *available at* [http://www.kantei.go.jp/foreign/asospeech/2008/09/29housin\\_e.html](http://www.kantei.go.jp/foreign/asospeech/2008/09/29housin_e.html).

and engaging case teams in internal peer reviews to improve the quality of enforcement actions. DG SANCO has conducted several forward-looking workshops and simulations to identify the key challenges it will face in the future, and to identify what skills, tools, internal processes, and working methods it needs to develop to meet those challenges.<sup>8</sup>

Newer agencies in such countries as Brazil, El Salvador, Hungary, Mexico, Singapore, South Africa, and South Korea also are exploring major institutional improvements. Two interesting examples in the consumer protection area are El Salvador and South Korea. In El Salvador, the consumer agency, the Defensoría del Consumidor, prepared a report that elevated consumer issues to the equivalent of “Cabinet-level” by developing a National System for Consumer Protection, composed of the Defensoría and representatives of the executive branch and other government institutions, to coordinate consumer protection issues.<sup>9</sup> In South Korea, the Korean Consumer Protection Board, which was a quasi-governmental entity, has merged with the Korean Fair Trade Commission, a governmental competition authority, enhancing the state’s support for consumer policy and enforcement missions and linking consumer and competition issues structurally. On the competition side, the Netherlands Competition Authority (“NMa”) has engaged in a more sophisticated balance of its various tools and enforcement instruments, focusing on risk-oriented enforcement action on a proportional scale and more on market studies, with less engagement in markets in which there are little or no problems and in which none are expected to arise, as well as additional efforts directed at informational campaigns, guidance, and compliance programs.

The determination of our foreign counterparts, old and new, to benchmark themselves with their peers and to incorporate superior techniques into their own operations is well worth emulating.<sup>10</sup> In the international arena, one hallmark of a good agency always has been its capacity to influence views of what constitutes sound competition and consumer protection policies by “exporting” ideas, mainly through the example of its own policy work and enforcement practice. Today, as the FTC’s overseas consultations for this project demonstrated, the difference between an agency with a good international program and one with an excellent international program may be the agency’s skill in importing ideas, as well. This demands close attention to the experience of other jurisdictions and the willingness to embrace superior practices from the rest of

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<sup>8</sup> A description of the project and the resulting paper are available at [http://ec.europa.eu/dgs/health\\_consumer/events/future\\_challenges\\_en.htm](http://ec.europa.eu/dgs/health_consumer/events/future_challenges_en.htm).

<sup>9</sup> See OECD, COUNTRY STUDIES: EL SALVADOR – PEER REVIEW OF COMPETITION LAW AND POLICY 22 (2008), available at <http://www.oecd.org/dataoecd/8/49/41597078.pdf>.

<sup>10</sup> See, e.g., U.K. DEP’T FOR BUS. ENTER. & REGULATORY REFORM (“BERR”), BENCHMARKING THE PERFORMANCE OF THE UK FRAMEWORK SUPPORTING CONSUMER EMPOWERMENT THROUGH COMPARISON AGAINST RELEVANT INTERNATIONAL COMPARATOR COUNTRIES (2008) (report prepared for BERR by the ESRC Centre for Competition Policy, University of East Anglia), available at <http://www.berr.gov.uk/files/file47653.pdf>.

the world. The exchange of ideas and strategies in consumer protection and competition is increasingly “a two-way street.”<sup>11</sup>

If the FTC is to exert effective leadership in forming policy at home and abroad, we must be no less driven than our foreign counterparts to examine and enhance our own institutional framework and operations and have procedures in place to respond effectively to new commercial phenomena and to learn from developments taking place within established and emerging competition and consumer regimes around the world. What has emerged globally is a form of competition by individual jurisdictions to achieve superior regulatory frameworks. This rivalry reflects awareness that the attainment of superior frameworks – systems that achieve sound policy outcomes at the lowest cost to society – can be a valuable source of national economic advantage. That is a competition worth having, and the FTC means to be a successful participant in the contest.

Another reason for the FTC to conduct this self-assessment is to ingrain in the agency a habit of periodic self-evaluation to illuminate the way to future improvements. To a large extent, the chief means for evaluating the performance of public institutions in the United States has consisted of convening from time to time (often in the face of crisis) blue ribbon panels of outside experts.<sup>12</sup> So it has been with the Federal Trade Commission.<sup>13</sup> To a point, these blue ribbon studies are helpful, but they have severe limitations. Among other weaknesses, the blue ribbon panels tend too often to glide over basic questions about the appropriate standards for measuring agency performance.

Reviews of agency performance also take place through the work of committees assembled to facilitate the transition from one presidential administration to another. Presidential transition reports suffer from their own frailties. The imperative to turn them out in a short time – often a few weeks or months – sometimes imbues a transition report’s analysis and recommendations with glibness and superficiality. Because their drafters lack the time to place events in a larger historical context, policy prescriptions in these documents often focus myopically on the short term. Because their assessments of past performance set a benchmark against which future innovations can be assessed, the drafters may tend to devalue past accomplishments.

The FTC at 100 project seeks to overcome these limitations by encouraging acceptance of a norm of periodic self-assessment and creating a template for the agency to engage regularly in an analysis of its performance. There is no substitute for the agency’s own sustained efforts to get things right. As George Stigler observed in a blue

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<sup>11</sup> AMERICAN BAR ASS’N SECTION OF ANTITRUST LAW, 2008 TRANSITION REPORT 18 (2008) [hereinafter ABA TRANSITION REPORT], available at <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf>.

<sup>12</sup> On the use of blue ribbon panels as public administration evaluation mechanisms, see William E. Kovacic, *Blue Ribbon Commissions: The Acquisition of Major Weapon Systems, in ARMS, POLITICS, AND THE ECONOMY – HISTORICAL AND CONTEMPORARY PERSPECTIVES* 61 (Robert Highs ed., 1990).

<sup>13</sup> The use of blue ribbon panels to evaluate the FTC is recounted in William E. Kovacic, *The Federal Trade Commission and Congressional Oversight*, 17 TULSA L.J. 587, 592-602 (1982) [hereinafter Kovacic, *Oversight*].

ribbon study of defense procurement in 1970, “[n]o organization can achieve or maintain efficiency in structure or operation by having a critical review made by expert outsiders once each five or ten years. . . . A good organization must have built into its very structure the incentives to its personnel to do the right things.”<sup>14</sup>

The FTC at 100 project also has attempted to decouple the process of self-assessment from any single electoral cycle and to put the focus on adjustments that will improve the agency over the long term. By focusing on the Commission’s centennial, this exercise has sought to achieve a longer-term perspective and engage the agency in the valuable process of considering the goals that animated the agency’s creation and assessing how well the FTC has attained them. The aim is to identify approaches for improvement that are not only good today but will be good in the decades to come.

### **Focal Points and Means**

The FTC self-assessment has focused on two broad issues. First, when we ask how well the Commission is carrying out its responsibilities, by what criteria should we assess its work? The scholarly literature and popular commentary on the FTC is replete with rough assessments of whether the Commission is performing “well.” Far more often than not, the definition of “good performance” that presumably underpins such judgments is poorly specified. It is impossible to form conclusions about an agency’s performance without some basic understanding of what the agency ought to do. This, in effect, requires the construction of an agency report card.

Second, by what techniques should we measure the agency’s success in meeting the normative criteria by which we determine whether the agency is performing well? Once standards for assessing performance are chosen, it is necessary to decide how to apply them. How, in other words, are grades to be calculated? A major aim of this element of the self-assessment is to identify the best means for measuring the effects and quality of what the FTC has done.

We addressed these questions through a mix of internal deliberations and external consultations. We asked difficult questions of ourselves and sought to see ourselves as others see us. The external consultations took two forms. We conducted extensive interviews and convened 12 workshops (including seven outside the United States) at which expert observers from academia, business groups, consumer organizations, and government bodies discussed the Commission’s programs, operations, and organization.

The self-assessment yielded three basic products. One is a consideration of the agency’s likely resource needs over the next five to six years. The second was a collection of observations from our external consultations about the quality of individual substantive and procedural measures that the FTC has undertaken. The third is a review of the institutional arrangements by which the Commission performs its responsibilities.

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<sup>14</sup> BLUE RIBBON DEFENSE PANEL, REPORT TO THE PRESIDENT AND THE SECRETARY OF DEFENSE ON THE DEPARTMENT OF DEFENSE 198 (1970).

This report presents the third of these products. Although the report does not treat all topics addressed in our deliberations, or examine some matters in complete detail, many of the proceedings have been posted on the FTC's website for fuller study. We hope that the process used for this self-assessment not only has illuminated ways to improve the FTC but also has supplied a template for future self-assessment exercises.

### **Conclusion: The Engineering of Competition and Consumer Protection Policy**

The progress of the Federal Trade Commission in its modern era has built heavily upon the willingness of its people to assess their work critically and explore possibilities for improvement. Critical self-study and external consultations not only have helped identify paths to achieving greatness, but also have renewed the institution's commitment to fulfill the destiny that Congress in 1914 wished it to achieve.

The FTC at 100 self-assessment is the latest element of that tradition, and the exercise has yielded valuable insights about strengthening the agency. Several areas stand out. The inquiry has helped identify what resources – personnel, facilities, equipment – the FTC will need to perform its duties in the future. Nothing is more vital to the success of the Commission than its human capital. A crucial reason for the agency's improvement in recent decades is a progressive strengthening of the quality of its administrative professionals, attorneys, and economists. A second reason is the farsighted investment the agency has made in information technology to improve the productivity of its employees. Nothing will be more vital to our future success than seeing that the modern historical trend toward assembling an ever more capable staff and ever more powerful technological tools to support them continues. This inquiry also has helped identify steps the agency should take, once it has attracted talented individuals, to make the workplace a most satisfying experience.

A second result is to suggest how the FTC might improve its approach for choosing strategies for exercising its powers. No task of administration is more important than selecting priorities.<sup>15</sup> Everything the Commission does flows from its process for deciding which pursuits are most worthy of its attention. The setting of effective strategies calls for the agency to use its litigation and nonlitigation tools. Among other features, this exercise involves deciding how to set the agenda for the FTC's research program. From the start, the Commission was intended to undertake studies and to supplement and undergird its enforcement efforts with a broad research agenda. Today, in a world of multiple competition and consumer protection decision makers, intellectual leadership assumes an ever-increasing role in determining the ability of an individual agency to shape policy developments. Identifying the best possible form and application of our research activities is indispensable to the FTC's ability to exercise intellectual leadership.

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<sup>15</sup> See William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE L. REV. 319 (2007).

A third product of this self-assessment has been to identify how the FTC can strengthen its processes for implementing its programs. The manner in which an agency organizes its operations deeply shapes the quality of its substantive initiatives and affects the costs that firms bear in complying with the agency's commands. Finding better ways to organize our operations not only will improve the Commission's own efficiency but also can reduce the compliance costs for business operators without diminishing the effectiveness of the agency's substantive programs.

Finally, the inquiry has pointed to how the FTC can better fulfill its duties by improving links with other government bodies and nongovernment organizations. Cooperation among government bodies within and across jurisdictions is one of the most important frontiers for improving the productivity and effectiveness of public competition and consumer protection authorities. The broad decentralization of authority within the United States, the emergence of multiple regulatory authorities around the world, and the awareness of heightened interdependence among regulators and national regulatory regimes underscore the need for stronger interagency networks and intensified collaborative projects. The gains from greater cooperation also extend to the FTC's relationships with nongovernment bodies, such as academic research centers, consumer groups, and professional societies.

The emphasis throughout the study is institution-building. Discussions about competition law and consumer protection tend to focus heavily on conceptual issues of doctrine and large questions about the appropriate substance of public policy. The attention given to these unquestionably important matters – the “physics” of competition policy and consumer protection – obscures the importance of how to engineer institutions and programs that can transform theory and concepts into effective programs. This study is about the “engineering” of competition and consumer protection policymaking. It recognizes that successful public policy outcomes are the product of good physics and good engineering. It takes faith in the proposition that has guided generations of successful athletes and musicians: over time, good technique begets good performances.

The orientation of this study also is long-term in nature, at least by the customs of national policymaking in the United States. The measures suggested here generally do not lend themselves to instant accomplishment but instead require sustained, incremental effort. The five-year focus seeks to draw attention to institution-building activities that demand a continuity of effort across administrations and across the tenure of individual chairmen. The public policy environment in the United States does not tend to nurture this perspective. In the eyes of many observers, the reputations of individual agency officials are set by observable events that transpire during the individual's tenure. This point of view discourages investments in activities with long-term, capital qualities that generate benefits to the agency well beyond a single manager's time in office.

Fred Hilmer, the President of the University of New South Wales and a major figure in the modern development of Australia's competition policy and consumer protection system, tells his executive MBA students that the success managers enjoy today probably has roots in decisions taken by their predecessors five or more years ago.

Professor Hilmer poses the following inquiry to his manager-students: what are you doing today to improve the lot of your successors five years hence? This report seeks to answer that challenge for the FTC by encouraging acceptance of a norm that gives proper attention to building and enhancing the institutional foundations on which good policies must stand.

## **PART 2: INSTITUTIONAL FOUNDATIONS OF SUCCESSFUL FTC PERFORMANCE**

One cannot make sensible judgments about whether an agency is performing skillfully or poorly without first defining the criteria by which the agency will be tested. It is a meaningless exercise to say that an agency today is good or bad, doing better or worse, or surpassing other institutions without identifying the grounds for the assessment.

By what criteria are we to decide whether the FTC is a good institution? The definition of standards is fundamental to the study of the performance of the Commission or any other public body, yet the need to clearly specify criteria frequently gets less attention than it deserves. The literature on the FTC underscores the point. There is a massive body of commentary that evaluates the programs, operations, and structure of the FTC. Two flaws weaken many of these accounts. Some commentators offer broad qualitative judgments without a clear statement of standards. In the course of trying to increase the gravity of their own assessments by discerning longstanding trends, other authors mechanically invoke the conclusions of earlier assessments without carefully studying the criteria employed by previous analyses.

This self-study dwelled extensively on the basic question of what criteria serve to separate good performance from adequate or weak performance. One of its central aims was to identify institutional features that beget good substantive outcomes over time. Public policy is delivered through an infrastructure of institutional arrangements. The quality of a jurisdiction's institutional infrastructure shapes substantive policy results. Presented below are the institutional arrangements whose attainment ought to be the FTC's objective.

## I. Agency Mission

A fundamental characteristic of a good institution is the clarity with which it understands its purpose and defines its “mission.” The FTC’s mission has two dimensions. One is related to the substance of policy, and the other deals with the process by which policy is formed. The substantive dimension consists of the public policy goals that the Commission should accomplish on behalf of the American public.<sup>16</sup> The FTC functions well as an institution when it clearly defines what it means to do and spells out how it will go about its duties.<sup>17</sup> A well-defined conception of the agency’s aims helps facilitate the choice of projects by which the agency implements its authority. To do these tasks well, the Commission needs to understand what problems Congress created it to solve.<sup>18</sup>

The second dimension of the FTC’s mission involves the means that Congress placed at its disposal to address economic policy issues. Congress gave the Commission a distinctive collection of institutional endowments. These include law enforcement powers, a collegial governance structure, special information gathering tools, the authority to issue reports, the combination of competition policy and consumer protection responsibilities, an elastic substantive mandate, rulemaking powers, and the authority to use administrative adjudication to articulate standards of business conduct. The Commission’s application of this portfolio of policy instruments is no less an ingredient of its mission than the attainment of substantive policy goals entrusted to it. If the agency cannot produce superior policy outcomes by reason of this combination of policymaking attributes, the rationale for the FTC’s very existence comes into question.

Both dimensions of the FTC’s mission ideally should be defined in a manner that facilitates meaningful measurement of whether the agency is achieving its substantive aims and using its distinctive institutional capabilities effectively. Measurement is the final element in a public administration lifecycle that begins with the definition of aims, proceeds with the selection of implementing programs, and concludes with the assessment of results. In measuring how well the agency uses its capabilities to formulate competition policy or consumer protection policy, the Commission should focus on the economic outcomes it achieves for the public (for example, reducing economic losses that result from fraud), rather than focusing on the inputs the FTC dedicates to a task (for example, the number of staff assigned to address activities in a certain sector) or the program outputs it generates (for example, the number of cases filed

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<sup>16</sup> In discussing the performance of government bodies, James Q. Wilson refers to “critical tasks,” which, if achieved, will deal with the agency’s “key environmental problem.” See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 25-26 (1989). This section of the report uses mission and goal interchangeably.

<sup>17</sup> See, e.g., Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 167 (2005) [hereinafter Muris, *Principles*]; Ellig, 7/30 DC Tr. at 6-7.

<sup>18</sup> Breul, 7/30 DC Tr. at 15 (“[H]igh-performing organizations have a clarity of their purpose . . . . [W]ithout that clarity and understanding of the problem to be solved, you really can’t move on.”).

or the number of studies completed). Practical difficulties associated with directly measuring economic outcomes account for the frequency with which the Commission and other authorities fall back upon agency inputs or outputs as proxies for economic impact.

Once the agency has defined the substantive and process elements of its mission, the Commission must articulate these elements clearly to enable its own staff and external constituencies to understand what the agency is trying to achieve and how it is seeking to do so.<sup>19</sup> The FTC’s clear articulation of its mission is a vital means by which it attains the necessary objective of building support for its work from internal and external constituencies over time.

In this section, we address these and related issues concerning the Commission’s mission. In doing so, we draw upon various views of the FTC’s mission that were presented during the public consultations of the self-assessment. Some concepts, particularly the challenges of measuring successful completion of the mission and gaining external support, also will be discussed in greater detail later in the report.

#### **A. Clearly Articulating the Mission**

As a threshold matter, agency leaders must clearly articulate the agency mission so that staff and external constituencies have a firm grasp of the organization’s objectives.<sup>20</sup> As one leading public administration scholar has explained:

Everyone in the organization needs to understand the big picture. Thus, the leaders of the organization need to proclaim, clearly and frequently, what the organization is trying to accomplish. . . . If the agency’s leaders want everyone in the organization to take the mission seriously, they need to reiterate its fundamental points at every opportunity.<sup>21</sup>

For some administrative agencies, statutes clearly specify the mission. For example, the Social Security Administration (“SSA”) is required by law to send monthly checks to eligible persons. Accordingly, the SSA easily has discerned its mission – to pay benefits on time and accurately – from its statute.

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<sup>19</sup> See MARK A. ABRAMSON ET AL., *THE OPERATOR’S MANUAL FOR THE NEW ADMINISTRATION* 25 (2008) (explaining that Robert Behn recommends that agency heads “proclaim – clearly and frequently – what the organization is trying to accomplish”).

<sup>20</sup> See *id.* at 25-26.

<sup>21</sup> ROBERT D. BEHN, *PERFORMANCE LEADERSHIP: 11 BETTER PRACTICES THAT CAN RATCHET UP PERFORMANCE* 8-9 (2006). See also ABRAMSON ET AL., *supra* note 19, at 7 (explaining how one key component of the Veterans Health Administration’s transformation was clearly articulating its vision).

The clarity found in the Social Security example is not ubiquitous. Most government agencies “are likely to have general, vague or inconsistent goals, about which clarity and agreement can only occasionally be obtained.”<sup>22</sup> The urgency to achieve clarity and coherence in policymaking is especially acute for the FTC, to which Congress has given responsibility for implementing over 50 statutes. Given the array of policy impulses that motivated the enactment of these measures, it may not be possible to identify a single unifying principle that links all legislative commands within the Commission’s policymaking domain. Nonetheless, continuous FTC efforts to identify and reinforce common aims across the span of its jurisdiction serve the important end of building a coherent portfolio of projects that address the most serious competition and consumer protection problems while minimizing inconsistencies or contradictions that reduce its effectiveness.

A vital starting point for this endeavor is the Commission’s principal statutory mandate. Section 5 of the FTC Act prohibits “unfair methods of competition” and bars “unfair or deceptive acts or practices.”<sup>23</sup> The key operative terms of these commands are not self-defining, and it is difficult to derive an operational mission directly from their text.<sup>24</sup> In these circumstances, the FTC and other agencies with comparatively open-ended substantive mandates must define and develop an operational mission. The Commission’s leadership should ensure that the mission derived from broad statutory commands is sufficiently specific in identifying what the FTC does to guide agency action.

From time to time, Congress has amended the FTC Act to define more fully some of the statute’s most general commands. For example, Section 5 of the FTC Act today provides that the Commission cannot find an act or practice to be unfair unless it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>25</sup> Reflecting these provisions, the Commission has defined its mission as follows: “To prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these missions without unduly burdening legitimate business activity.”<sup>26</sup>

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<sup>22</sup> WILSON, *supra* note 16, at 26.

<sup>23</sup> 15 U.S.C. § 45(a)(1).

<sup>24</sup> Some have observed that the FTC’s organic statute – calling for it to prevent “unfair” and “deceptive” business practices – is too vague to define a mission. *See* WILSON, *supra* note 16, at 59; Muris, 7/29 DC Tr. at 19 (“the statute is way too broad in providing any sort of rigorous guidance”). *But see* Ellig, 7/30 DC Tr. at 32 (“I think that the FTC’s organic statute is more focused than the mandates that some federal agencies have, where at least there’s clearly a focus on the consumer which in some cases is specific enough to guide action.”).

<sup>25</sup> 15 U.S.C. § 45(n).

<sup>26</sup> FTC, STRATEGIC PLAN: FISCAL YEARS 2006-2011, at 1 (2006) [hereinafter 2006 FTC STRATEGIC PLAN], available at <http://www.ftc.gov/opp/gpra/spfy06fy11.pdf>.

There appears to be widespread understanding that the FTC's current mission focuses on consumers and that the improvement of consumer welfare is the proper objective of the agency's competition and consumer protection work.<sup>27</sup> An important consequence of this focus is that Commission policy does not seek to enhance or degrade the position of individual market participants as an end in itself. For example, the improvement of market outcomes for consumers, and not the status of specific firms or collections of enterprises, is the reason to challenge fraud, deceit, and related forms of unfair practices, and to police anticompetitive mergers and other practices that improperly suppress rivalry in the marketplace.<sup>28</sup> This perspective appears to enjoy broad support within the community of competition policy and consumer protection agencies. During his tenure as the first Chief Economist in DG Comp, Lars-Hendrik Röller punctuated this concept with his habit, in the course of discussions about proposed enforcement initiatives, of asking case handlers, "What is the theory of consumer harm?"

To say that the well-being of consumers, rather than individual producers, is the appropriate concern of competition and consumer protection policy does not by itself determine exactly what an agency with these responsibilities should do. Modern commentary and the consultations for the FTC self-study display extensive discussion about what specific competition and consumer protection initiatives best serve consumer interests in the immediate term and for the long run. How much weight, respectively, do efficiency effects and distributional consequences deserve in the decision to intervene? Are the efficiency gains realized by producers cognizable only if producers pass those gains largely or entirely to consumers in the relatively short term?

The FTC self-study did not try to resolve these debates, but several informative observations concerning the issue emerged from the proceedings. The first is that modern FTC programs designed to address improper collusive or exclusionary restrictions on output, price, or quality commonly have positive distributional effects as well as efficiency consequences.<sup>29</sup> The same can be said of the agency's consumer protection programs. For example, many initiatives undertaken as part of the Commission's program to combat serious fraud have special significance for economically disadvantaged populations or other social groups that, for various reasons,

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<sup>27</sup> Former Chairman Robert Pitofsky has observed that the FTC's competition and consumer protection activities share the overriding mission of improving consumer welfare. *More than Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 780-81 (2005) [hereinafter, *Conversation with Muris and Pitofsky*]. See also Ellig, 7/30 DC Tr. at 33-35 (arguing that, although the competition (and consumer protection) laws are relatively broad, there is a consensus among the Commission and the antitrust community generally that consumer welfare is the focus of the antitrust laws).

<sup>28</sup> As former Chairman Timothy Muris made the point, since the 1970s there has been agreement that the FTC's core mission is to protect the competitive process: "The FTC is an umpire. It's not one of the star players." Muris, 7/29 DC Tr. at 20.

<sup>29</sup> A representative illustration can be found in FTC efforts to challenge unjustified public and private restrictions on the provision of professional services. See William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 WASH. U. J.L. & POL'Y 101, 109-10 (2007) (discussing FTC decision in 2004 to strike down certain limits on the use of dental hygienists to provide fluoride treatments to public school children).

might be especially vulnerable to fraudulent sales schemes.<sup>30</sup> In general terms, it is difficult to find instances in which the pursuit of the programs that have formed the core of the FTC's modern competition and consumer protection programs have featured a tension between the attainment of efficiency and distribution-related goals, respectively.

Second, many roundtable panelists commented on the disciplining role that a focus on consumer welfare provides. For example, one panelist noted that focusing on consumer welfare, rather than also on potentially countervailing, and less measurable, interests like "fairness," provides "clarity of objective."<sup>31</sup> In the context of the FTC's efforts to apply its authority to forbid unfair methods of competition and to ban unfair or deceptive acts or practices, an emphasis on preventing and redressing consumer harm provides a valuable means for ensuring that the application of the agency's powers will make markets work better for consumers.

In addition to the broad substantive reach of its mandate, the FTC has a broad sectoral reach. The Commission's enforcement jurisdiction extends to conduct "in or affecting commerce" in most sectors of the economy.<sup>32</sup> However, the FTC Act (and sometimes other laws) imposes certain limits on the Commission's sectoral reach, including limits applicable to common carriers and financial sectors.<sup>33</sup> Some panelists expressed the view that the FTC's mission should be extended to encompass areas of commerce currently subject to limits on the agency's jurisdiction. For example, one panelist advocated expanded FTC law enforcement jurisdiction to "represent the consumer interest at the federal level" in areas such as banking and mobile phones.<sup>34</sup> Similarly, another panelist noted that, in the wake of the current financial crises, the FTC should play a major role when Congress reforms the current regulatory oversight scheme for financial services companies currently beyond the scope of FTC jurisdiction.<sup>35</sup> These suggestions were consistent with the basic articulation of the agency mission to protect consumers in the marketplace.

The concern about the modern suitability of longstanding jurisdictional limits underscores an important point about the FTC's mission. The definition of aims is inherently evolutionary. Technological innovation and other commercial phenomena call for periodic reassessment of assumptions that guided the establishment of exemptions and other restrictions on the Commission's authority. More generally, dynamism in

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<sup>30</sup> *Id.* at 114-15 (discussing, among other FTC programs, the development earlier this decade of a program to address fraud directed toward Spanish speakers in the United States).

<sup>31</sup> *See* Humpherson, London Tr. at 24-25 (the "clarity of objective" that comes from a focus on consumer welfare is "one of the great strengths" that competition authorities enjoy); Bloom, London Tr. at 23 ("I would be cautious about adding something like fairness. If you did widen it, what happens if you satisfy the fairness one but it reduces welfare? So you could have a tension if you have more than one objective.").

<sup>32</sup> *See* 15 U.S.C. § 45.

<sup>33</sup> *See id.* § 45(a)(2) (exclusions applicable to common carriers and financial institutions).

<sup>34</sup> *See* T. Schwartz, Chicago Tr. at 52-54.

<sup>35</sup> *See* Swire, NY Tr. at 203-04, 209.

commerce and in public administration call for the FTC to revisit from time to time the reason for its existence and to ask how its goals best can be realized. The question of implementation – how the FTC should carry out its consumer-focused mission – will be explored throughout the remainder of this report.

## **B. Measuring Outcomes Rather than Outputs**

In addition to a clearly articulated mission, there should be a close nexus between the mission and outcomes for the public that can be measured.<sup>36</sup> Missions focused on agency outputs (such as cases) rather than outcomes (such as increased consumer welfare) may not lend themselves to meaningful measurements of public benefits.<sup>37</sup>

It is typically easier to identify and measure government agencies' outputs rather than outcomes. Thus, agency leaders should articulate a mission that lends itself to developing outputs that enjoy a close nexus with desired outcomes.<sup>38</sup> For example, in the context of public health, an agency might confidently assume that increased output of immunizations will advance a mission focused on the outcome of a healthier population.<sup>39</sup> As one roundtable panelist explained with regard to the U.S. Department of Health and Human Services:

One of the things that they're trying to do is improve the safety, quality, affordability and accessibility of healthcare; prevent and control disease, injury, illness and disability; protect the public from infectious occupational, environmental and terrorist threats. . . . [I]f you listen to that carefully you could think, gosh, measures darn near fall right out of that. . . . [T]hey look at things like percentage of the population with prescription drug coverage. That's something that's verifiable, tells you whether they're achieving some of their mission or not. The number of people and percent of people in the country with ongoing access to healthcare. The percentage of the population with immunization coverage. These are all things that are either health outcomes or closely related to health outcomes that fall right out of their mission.<sup>40</sup>

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<sup>36</sup> Measurement of outcomes may be direct or via output proxies. See *infra* Chapter VII for a more detailed discussion of this topic.

<sup>37</sup> See Breul, 7/30 DC Tr. at 23-24; Ellig, 7/30 DC Tr. at 25-26.

<sup>38</sup> See BEHN, *supra* note 21, at 10-12. See also Sanderson, Ottawa Tr. at 23 (stressing importance of focusing on outcomes rather than outputs).

<sup>39</sup> See BEHN, *supra* note 21, at 12.

<sup>40</sup> Ellig, 7/30 DC Tr. at 18-19.

In some cases, theoretical analysis or empirical research can provide a confident basis for determining that certain types of outputs – for example, prohibitions on agreements by rivals to restrict truthful advertising or rules forbidding sellers to make unsubstantiated claims about the efficacy of weight-control products – ordinarily serve to improve consumer welfare. Even for these policy presumptions, it is appropriate for public officials to consider from time to time whether the assumptions that support investments in certain types of outputs remain sound. A further matter for continuing observation and analysis is whether adjustments in the specific mix of outputs might achieve better policy results. For example, the initiation of cases to prosecute serious marketing fraud properly can rest upon the assumption that serious fraud ordinarily diminishes consumer welfare, typically enjoys no legitimate business justifications, and warrants categorical condemnation. At the same time, the FTC and other consumer protection agencies might consider supplementing anti-fraud cases with consumer education programs that encourage precaution taking by potential victims. Over the past decade, this type of examination has led the Commission to increase outlays for consumer education and to hold occasional workshops to explore enhancements in its program to deter fraud.<sup>41</sup> In this area and in other matters, an outcome-focused policy perspective helps ensure that the Commission’s existing programs are not simply a consequence of adhering to custom and that the FTC remains alert to possibilities for improving results for consumers by adjusting the mix of its policy initiatives.

Several foreign enforcement agencies that also have responsibility for both consumer protection and competition matters have mission statements that are focused on outcomes and reflect such agencies’ dual roles. The mission of the U.K. Office of Fair Trading, for example, is “making markets work well for consumers.”<sup>42</sup> The Canadian Competition Bureau’s vision is “to be an organization of excellence that produces high impact outcomes and is flexible in order to meet the challenges of the marketplace today and in the future.”<sup>43</sup> The purpose of the New Zealand Commerce Commission “is to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice.” New Zealand’s statement of aims identifies three strategic goals: (1) “markets are dynamic and all goods and services are provided at competitive prices”; (2) “consumers are confident of the accuracy of information they receive when making choices”; and (3) “regulated industries are constrained from earning excess profits, face incentives to invest appropriately and share efficiency gains with consumers.”<sup>44</sup>

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<sup>41</sup> The FTC’s Fraud Forum scheduled for late February 2009 is an example of this type of initiative. See FTC Press Release, FTC to Host “Fraud Forum” (Oct. 7, 2008), available at <http://www.ftc.gov/opa/2008/10/fraud.shtm>.

<sup>42</sup> U.K. Office of Fair Trading Home Page, <http://www.offt.gov.uk/>.

<sup>43</sup> Canadian Competition Bureau, Competition Bureau Priorities At-a-Glance 2008 to 2010, [http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/priorities-en.pdf/\\$FILE/priorities-en.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/priorities-en.pdf/$FILE/priorities-en.pdf).

<sup>44</sup> New Zealand Commerce Commission, Overview, <http://www.comcom.govt.nz/TheCommission/Overview.aspx>. The Commerce Commission, unlike the FTC, has primary responsibility for regulated sectors.

Beyond emphasizing outcomes rather than outputs, a mission that focuses on *measurable* outcomes has several advantages. First, it can provide staff with information on how their actions affect achievement of the agency's goals. This information can allow the agency and its staff to better calibrate actions against goals, which can improve effectiveness. If the agency can define a mission for which it can identify measurable outcomes, managers can more easily understand where they are successful and where they must improve. Second, a measurable outcome-focused mission can motivate improved performance by allowing staff to know when they are performing their job well. Third, when missions focus on outcomes rather than inputs or outputs, the agency more readily can adjust the allocation of its resources better to achieve desired policy results while continuing to focus on the agency goals.<sup>45</sup> Alternatively, if the mission is not defined in a readily measurable way, an agency can expend scarce resources engaging in activities that do not advance its goals.

The consultations with the Canadian Competition Bureau ("Bureau") revealed a promising approach to incorporating the measurement of outcomes into the definition of its mission and its selection of individual projects. In recent years, the Competition Bureau has moved toward pressing its operating units to state, when proposing new investigations, cases, or other measures, how the effectiveness of a chosen initiative might be measured as the initiative unfolds.<sup>46</sup> The Bureau's practice seems worthy emulating. By asking its project teams to address from the beginning "how will we know this initiative is working" seems a useful way to assist the Commission in deciding which matters to pursue and to monitor progress toward the accomplishment of the agency's goals.

A further advantage of emphasizing the measurability of outcomes involves the FTC's external constituencies. Measurability of outcomes allows political decision makers, nongovernment constituencies, and the general public better to estimate the particular level of public benefits associated with a given outlay of public funds. In this manner, measurable outcomes will allow Congress to allocate more efficiently scarce government resources to maximize benefits per dollar spent. The Commission's capacity to define its mission in terms of measurable outcomes has assumed greater importance at a time of financial crisis in the United States and overseas. To some observers, the crisis has raised doubts about the utility of competition and consumer protection policies that rely principally on market-based, decentralized economic choice as the way to organize economic affairs. In such an environment, the FTC and its counterparts overseas cannot expect those outside their walls to accept the value of their competition policy and consumer protection programs as a matter of faith. Quantitative and qualitative measures of effectiveness necessarily will assume greater prominence. With growing frequency,

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<sup>45</sup> See BEHN, *supra* note 21, at 12 (noting that when target outputs do not further the mission, which is focused on an outcome, agency leaders need to adjust target outputs); Ellig, 7/30 DC Tr. at 18 ("[When] the focus is on the goal rather than the means of the goal . . . [y]ou can dispose of the way of doing things or a means if it doesn't work, but the focus on the goal remains.").

<sup>46</sup> Consultation with Canadian Competition Bureau, Sept. 17, 2008.

competition and consumer protection authorities can expect to hear variants of the aphorism that says: In God we trust. All others provide data.

Chapter VII of this report examines more fully how best to measure the FTC's effectiveness in general and the impact of its programs on consumer welfare. As a general matter, the FTC since the late 1970s has devoted growing attention to the question of how to measure the effects of its policy choices. In this endeavor, the agency's Bureau of Economics and its data gathering and reporting powers have supplied a valuable foundation for devising approaches to measure the economic effects of FTC decisions to intervene and not to intervene. As one panelist noted, this form of economic expertise provides a vital tool for measuring whether actions had positive effects on consumer welfare: "[A]lthough consumer protection and competition laws are relatively broad, there is a consensus among the Commission and the antitrust community generally (e.g., courts, academics, practitioners) that consumer welfare is the guiding principle for antitrust laws, and economic analysis, in turn, is the proper method for determining what advances consumer welfare."<sup>47</sup> Another panelist noted that the FTC consumer protection mission's market-based approach is conducive to measurement because, like the competition mission, it is intended to protect and promote consumer welfare.<sup>48</sup>

### **C. Internal and External Support for the Mission**

A successful agency must enjoy support for its mission from core constituencies inside and outside the institution. For the agency to gain and maintain such support, these constituencies must understand the mission and be able to determine whether the agency is carrying out its responsibilities successfully.

For the FTC, one core constituency is its own staff of administrative professionals, attorneys, and economists. The Commission derives significant advantages from building widespread internal agreement upon and endorsement of its mission. Among other benefits, such support enables managers to economize on resources. When the FTC's staff understands and embraces the agency's stated aims, managers need spend less time to create incentives for staff to pursue the mission and can reduce the effort devoted to monitoring whether staff's efforts are consistent with the FTC's mission.<sup>49</sup>

Some foreign agencies, such as the Australian Competition and Consumer Commission, the Canadian Competition Bureau, and the U.K.'s Office of Fair Trading, build support among staff for the agency's mission by devoting extensive effort to

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<sup>47</sup> Ellig, 7/30 DC Tr. at 33.

<sup>48</sup> See Peeler, 7/30 DC Tr. at 134-35 ("[The FTC] really sweats the details about the effect on competition and the economic effect of what it's doing. . . . [I]f you apply a market-based approach to consumer protection . . . that helps you in assessing the measurements.").

<sup>49</sup> See WILSON, *supra* note 16, at 95.

articulate principles or values to guide staff in carrying out the agency's mission.<sup>50</sup> These agencies make recurring efforts to relate these principles and values to the routine of selecting and implementing projects. These and other agencies have used a variety of innovative means to communicate their goals to their staff. Some involve regular communication through internal information conduits. Others take the form of special agency-wide events. Canada's Competition Bureau and the OFT hold annual "town halls" attended by all of their personnel. Among other activities, these town halls provide an opportunity for senior management to review recent events and to spell out their vision for the way ahead. In 2008 the European Commission's competition directorate held an "away day" in Brussels that assembled its entire staff for a similar event.

The FTC today uses a variety of means to communicate its goals to its staff. These include regular announcements on the Commission's intranet, periodic retreats for individual operating units, a yearly state of the Commission address delivered by the FTC Chairman, an annual awards ceremony, and other occasions that provide opportunities for senior leadership to explain the agency's aims. Staff can watch Commission meetings in person, by teleconference, and over the Internet, and these provide guidance about the agency's aims. Several times each year, the Commission holds meetings and seminars in Washington for smaller groups of its staff. Given the size of the FTC's workforce and the distribution of staff geographically across the country, there would be considerable cost involved in following the practice of some foreign counterparts and having annual meetings of all personnel in Washington. Nonetheless, given the positive results that other agencies seem to achieve with their larger gatherings, the Commission might consider convening an agency-wide gathering every few years, or assembling all members of one of its principal operating groups (*e.g.*, all administrators, attorneys, and economists who work, respectively, on competition or consumer protection matters). Short of these measures, ongoing efforts by the FTC to study innovations in internal communication undertaken by peer organizations promise to yield useful ideas for adoption inside the Commission.

Beyond mobilizing its own employees, an agency also must enjoy support for its mission among external constituencies. Lack of external support for the mission can erode the perceived legitimacy of the agency's individual actions, cause Congress to withdraw part of its jurisdiction, and, in extreme circumstances, call into question its continued existence. James Q. Wilson explains that for any agency leader, "a good strategy is one that identifies a set of tasks that are both feasible and supportable –

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<sup>50</sup> See AUSTRALIA COMPETITION & CONSUMER COMMISSION, CORPORATE PLAN AND PRIORITIES 2008-09, at 2 (2008), available at <http://www.accc.gov.au/content/index.phtml/itemId/845527> ("We produce results in the public interest by: being accessible, transparent, independent and fair in our dealings with the community – including consumers, business and governments[; and] performing our role in a timely, effective, efficient and consistent manner that respects the confidentiality of information provided to assist us."); Canadian Competition Bureau, Operational Principles, [http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/h\\_00126e.html](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/h_00126e.html) (identifying confidentiality, fairness, predictability, timeliness, and transparency as operational principles); U.K. OFFICE OF FAIR TRADING, ANNUAL REPORT AND RESOURCE ACCOUNTS 2006-07, at 67 (2007), available at [http://www.offt.gov.uk/shared\\_offt/annual\\_report/438243/hc532.pdf](http://www.offt.gov.uk/shared_offt/annual_report/438243/hc532.pdf) (identifying passion, trust, courage, and openness as organizational values).

activities the organization has the capacity to engage in and that will elicit the support of important constituencies.”<sup>51</sup> Political adroitness in building such support is every bit as important to the success of the FTC’s programs as technical proficiency.

It is important to distinguish between support for a mission among internal and external constituencies over time, on the one hand, and unanimous support for specific agency actions, on the other. The former is necessary for a successful agency; the latter is not.<sup>52</sup> As former Chairman Muris explained, “I think that what you need is some understanding of the core mission that has support amongst that constituency [staff, business, courts, academics, and peers in government], not just today, but over long periods of time and through electoral cycles.”<sup>53</sup> Another way for the Commission to envision its work is that each of its initiatives accumulates political capital, expends political capital, or does both. To succeed over time, the FTC must monitor its political capital account. Ideally, the balance usually will be positive. The agency can function effectively with temporary, limited deficits – such as when it undertakes a program that initially involves serious political risks but promises to generate substantial positive economic returns to the economy. Substantial, chronic deficits are dangerous.

From the external consultations for the self-study and from other assessments of the agency’s work, the FTC today appears to enjoy substantial support for its mission. As noted earlier, there appears to be widespread agreement that the FTC is properly focused on protecting consumers and promoting competition.<sup>54</sup> Even those who have questioned whether the agency’s organic statute clearly defines the agency’s mission<sup>55</sup> agree that the mission – as currently interpreted – has broad, bipartisan support.<sup>56</sup> Further, several panelists expressed the view that the FTC’s vague statutory language provides it with the flexibility to allocate resources to accomplish its mission of protecting consumers.<sup>57</sup> The Commission’s modern custom of engaging in regular, extensive public consultations about a wide variety of its competition policy and consumer protection programs has provided an important, useful way to identify preferences of external groups and to build a consensus for its initiatives.

To maintain a positive balance of political capital requires continuous effort from administrative agencies such as the FTC. As one political scientist has made the point, “each agency must constantly create a climate of acceptance for its activities and

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<sup>51</sup> WILSON, *supra* note 16, at 208.

<sup>52</sup> See Muris, *Principles*, *supra* note 17, at 167 (having support of external constituencies for an agency’s mission “does not mean that the agency’s mission must be ‘popular’ or that the constituents must support every particular agency action”).

<sup>53</sup> Muris, 7/29 DC Tr. at 20.

<sup>54</sup> See *supra* notes 28-27 and accompanying text.

<sup>55</sup> See *supra* note 24.

<sup>56</sup> See Muris, 7/29 DC Tr. at 61 (remarking on the “continued bipartisan nature of this agency” and shared “sense of the core mission of the agency”).

<sup>57</sup> See Bernstein, 7/29 DC Tr. at 17; Luehr, Chicago Tr. at 24; T. Schwartz, Chicago Tr. at 30-31.

negotiate alliances with powerful legislative and community groups to sustain its position. It must, in short, master the art of politics as well as the science of administration.”<sup>58</sup> How the FTC can identify its core constituencies and continue to build support for its mission is discussed in greater detail in subsequent sections of the report.

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A key foundation for the FTC’s success is to articulate its mission clearly and to state its mission in terms that focus on the outcomes the Commission seeks to achieve for consumers. The ability to tie outcomes back to the mission facilitates the development of reliable performance measures. The FTC’s staff can be more effective when they can relate the results of their actions to the agency’s mission. When the FTC staff understands and supports a stated mission, Commission managers need spend fewer resources to motivate staff to pursue the agency’s aims. Even if a mission is outcome-oriented and enjoys internal support, the mission also must enjoy external support for the agency to succeed.

These observations point to an important criterion by which we can determine whether the FTC is a “good” administrative body. Good performance begins with clarity and coherence in defining the Commission’s very purpose. The FTC is likely to be a more effective institution when it adopts a regular habit of asking itself the following questions: Has the Commission clearly defined its mission? Has the Commission defined its mission in a manner that focuses on the outcomes it hopes to achieve for consumers, rather than simply identifying the policy outputs – such as cases, reports, and rules – it intends to produce? Does the Commission’s definition of its mission lend itself to the formulation of measurable outcomes? Is the Commission’s mission well understood and supported by both the agency’s staff and external stakeholders?

The exercise laid out above is not a one-off event but an enduring imperative. From its formation in 1914, the Commission has operated in a dynamic environment. By giving the Commission a broad, elastic charter and related powers, Congress anticipated that the agency would evolve in the face of changing economic conditions, new commercial phenomena, shifting political currents, and developments in legal thought and industrial organization economics. To perform this inherently evolutionary policymaking role, Congress gave the agency a distinctive collection of institutional attributes to facilitate continuous adaptation and improvement.

By embracing a routine habit of examining itself and its operations to define and redefine its purpose, the Commission can engage in what two scholars of public administration, Richard Neustadt and Ernest May, have called “thinking in time streams,” which consists of applying “the kind of mental ability that readily connects discrete

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<sup>58</sup> FRANCIS ROURKE, BUREAUCRATIC POWER IN NATIONAL POLITICS 2 (1979).

phenomena over time and repeatedly checks connections.”<sup>59</sup> For the Commission, the connections that warrant close scrutiny are the links between its goals, its implementing measures, and the outcomes that such measures produce for consumers. By checking those connections intensely, the FTC puts itself in the best possible position to answer the three basic questions that Neustadt and May single out as the core concerns of public agency decision-making: “‘Will it work?’ ‘Will it stick?’ ‘Will it help more than it hurts?’”<sup>60</sup>

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<sup>59</sup> RICHARD NEUSTADT & ERNEST MAY, THINKING IN TIME 252-53 (1986). Neustadt and May call this type of thinking “a special style of approaching choices, more the planner’s or the long-term program manager’s than the lawyer’s or judge’s or consultant’s or trouble-shooter’s.” *Id.*

<sup>60</sup> *Id.* at 270.

## II. Agency Structure

The structure of an administrative agency such as the FTC deeply influences the skill with which it carries out its responsibilities. Jurisdictions can achieve important gains in economic performance by pressing themselves to achieve an optimal regulatory design. There is growing recognition within the community of competition policy and consumer protection authorities that jurisdictions that improve the quality of regulatory outcomes at the lowest possible cost to society can realize a valuable source of economic advantage.<sup>61</sup>

Structure and organization can affect the performance of an agency's priorities directly, for example, by having operational units dedicated to bringing specific types of cases or examining individual economic sectors, and indirectly, for example, by facilitating communication and coordination among agency components or having sufficient flexibility to address changes in rapidly transforming markets. Consumer protection and competition agencies around the world have a variety of structural designs. Some agencies have only competition or consumer protection enforcement authority. Others, like the FTC, combine the functions to meet a broader mission of protecting the marketplace for consumers. Among agencies with both functions, some organize their work along industry lines, while others divide along competition and consumer protection lines. Some agencies have a single commissioner or director, while others are led by a collegial body. Competition agencies, in particular, routinely include economists on their staffs, and there are different ways to incorporate economists' input into agency decision making.

This chapter examines how the design of the agency, integration of competition and consumer protection missions, communication, and the dual enforcement and adjudication functions affect achievement of the agency's mission.

### A. Current Agency Design

The significant connection between institutional design and agency effectiveness has led many of the FTC's counterparts overseas to undertake major efforts to determine whether adjustments in existing administrative structures and operational processes might yield superior results and whether the agencies have the components needed to serve their missions. As discussed in greater detail in Chapter III, this inquiry entails an assessment of whether the agency has the necessary human and physical resources to accomplish its mission.

For the FTC, a logical starting place for the analysis of structure is the composition of the FTC's core leadership.<sup>62</sup> The FTC is governed by a college of five

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<sup>61</sup> This was a recurring theme in the comments of leaders of the FTC's foreign counterparts. *See, e.g.*, Fingleton, London Tr. at 53-62; Consultation with DG Comp, Oct. 23, 2008; Consultation with Conseil de la Concurrence, Oct. 23, 2008.

<sup>62</sup> Agency leadership is discussed in more detail in Chapter V.A.

Commissioners, no more than three of whom may be members of the same political party.<sup>63</sup> A fundamental legislative assumption supporting the FTC's creation was that collective decision making would yield policy results superior to those attained by institutions governed by one official.

From 1914 to 1950, the Commissioners selected their own Chairman, and from 1916 to 1950 they rotated the position annually.<sup>64</sup> In 1950, pursuant to Reorganization Plan Number 8, the President became responsible for designating a Chairman from among the sitting Commissioners. The Reorganization Plan contemplates an important allocation of labor among the members of the FTC and other administrative agencies. By this measure, the board is responsible for setting policy through, among other means, the selection of cases and the promulgation of rules. The Chairman serves as the agency's executive and administrative head.<sup>65</sup> The FTC was one of the first multimember federal agencies, and its model has since been adopted for numerous other federal agencies, as well as a significant number of foreign competition and consumer protection agencies.<sup>66</sup>

The literature on the FTC and other administrative bodies identifies a number of conceptual benefits to multimember decision making. These include the application of diverse backgrounds to problem solving, the capacity of collective discussion to yield deeper insights into specific issues, and an increase in political legitimacy from having decisions taken by a board with varied political affiliations. It is also conceivable that, for purposes of performing various policy functions and reaching external constituencies, a multimember body can enjoy a form of multiplier effect. If a board can reach common cause concerning the agency's mission and means of implementation, each member of the board can serve as a spokesperson and can reach audiences that a single administrator might not be able to address.

How much the FTC and other administrative agencies have realized these and other benefits in practice is a matter of continuing debate. In the public consultations for this self-study, many participants spoke favorably about the multimember government structure. Former Chairman Robert Pitofsky endorsed the five-commissioner design in these terms:

You could argue theoretically in favor of a single Commissioner structure, or perhaps three Commissioners, or five, or even seven. The advantage of a multi-Commissioner structure, and the limitation that only three may come from the same political party, generally ensures a variety of views. Beyond theory, my impression is that in

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<sup>63</sup> 15 U.S.C. § 41.

<sup>64</sup> See generally Marc Winerman, *History through Headlines*, 72 ANTITRUST L.J. 871, 873 (2005).

<sup>65</sup> Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175.

<sup>66</sup> Competition and consumer agencies with a collegiate structure include, among others, the Australia Competition and Consumer Commission, the Competition Commission of Singapore, the Korea Fair Trade Commission, the Taiwan Fair Trade Commission, and the Japan Fair Trade Commission.

recent years (maybe not before 1970) the FTC has been a collegial body in which members worked together well and profited from their colleagues' views. I would leave the arrangement as it is.<sup>67</sup>

Panelists expressed the view that the nature and political balance of the body of Commissioners fosters discussion of new ideas and provides restraint on the political agenda of the agency. Former Commissioner Thomas Leary emphasized the benefits of a collegial body and urged more discussion among Commissioners:

I think [the FTC] can make and should make greater use of the ability of the Commission to function collegially because the Commissioners ultimately are the people who are going to have to set policy and make these decisions. . . . In [the Office of Policy Planning] operation [] there were these background papers being prepared which were going to be used in support of the Commission's advocacy role. And we met simply to discuss these various drafts of positions that the Commission might take on important matters of competitive policy, the extent of the state action exception and things of that kind. And it was not in the discussion of a particular case or it was not in the discussion of a particular Congressional hearing, it was simply to see if we could agree among ourselves on what the Commission's policy ought to be ultimately when these things arise. And I thought that that was tremendously innovative and a very useful way of making use of the collective wisdom, if you will, of the people who have been appointed to run this place.<sup>68</sup>

As the remarks of these former Commission members indicate, the logic of multimember governance assumes extensive interaction among the members of the board. Communications among Commissioners may take place informally or, more formally, through meetings. The Sunshine Act imposes significant restrictions on how these gatherings can take place and what number of Commissioners can participate.<sup>69</sup> In general terms, the Sunshine Act imposes constraints on actions by a quorum of Commissioners. These limits normally apply to communications among three or more Commissioners. When a combination of vacancies or recusals leaves only three Commissioners eligible to participate in a matter, the Sunshine Act limits communications between any two members.

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<sup>67</sup> *Conversation with Muris and Pitofsky*, *supra* note 27, at 849.

<sup>68</sup> Leary, 7/29 DC Tr. at 38-39.

<sup>69</sup> 5 U.S.C. § 552b.

The Sunshine Act has major implications for how Commission members interact. Consider the circumstance where all five members of the board are eligible to participate in a matter. In effect, the Sunshine Act forestalls all spontaneous discussion by more than two members of the Commission about most matters of agency business, including such items as pending law enforcement matters. For example, if two Commission members who happen to be engaged in a conversation about a proposed case are joined by a third Commissioner, the discussion about Commission business must cease. Discussions involving three or more Commissioners concerning agency business can take place only if notice of such gatherings is made public in advance. The noticed meetings must be opened to the public unless the subject matter satisfies one of several Sunshine Act exceptions (which allow, for example, the closure of meetings involving proposed law enforcement measures). As a consequence, much communication among Commissioners about agency business takes the form of seriatim, two-by-two conversations. These are prone to all of the difficulties in comprehension and interpretation that accompany the sequential transmission of information from one person to a second, and then to another. The Sunshine Act's limits do not apply to agents of the Commissioners. It is common practice for advisors of the Commissioners to meet as a group to discuss matters of agency business and, in many cases, to formulate common understandings on behalf of their principals.

Officials from foreign agencies with the multimember commission governance structure find the Sunshine Act restrictions astonishing. Their intuition is that limitations severely impede the application of the collaborative decision-making processes that are a major rationale for the design of a multimember governance system. They raise a fundamental question about administrative practice in the United States: It is not evident how the benefits of collective governance that appeared to animate the creation of the FTC can be realized if the existing limits of the Sunshine Act are unchanged. The FTC's experience, especially compared to that of its foreign counterparts, leads one to ask whether the costs to the quality of deliberation among Commissioners exceed the benefits of public transparency.<sup>70</sup> The possible modification of the statute would appear a worthy topic for discussion between the Commission and the Congress in the years to come.

Within the constraints of the Sunshine Act, the Commission has used a number of approaches to discuss larger issues of policy that arise outside the context of specific law enforcement actions. The Commission recently revived a practice, used from 1977 to 1982, of holding "policy review sessions," at which the Commission, with the help of staff, gathers and discusses how the Commission wants to proceed on particular issues.<sup>71</sup> Even with this method of discourse, the agency must place an account of the discussions in the public domain, subject to the redaction of material involving certain law enforcement matters. The effort among Commissioners to discuss sensitive topics in this format can be challenging.

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<sup>70</sup> Leary, 7/29 DC Tr. at 39. *See also* Bernstein, 7/29 DC Tr. at 42-43.

<sup>71</sup> *See* Kovacic, 7/29 DC Tr. at 45-46 (discussing earlier sessions).

Panelists in the consultations for the FTC self study did not discuss the qualifications of the individuals selected to be Commissioners and other senior agency officials. Commentators have focused extensively on this issue throughout the FTC's history.<sup>72</sup> Most recently, the ABA Section of Antitrust Law's 2008 Transition Report recommended that the incoming administration appoint competition officials who have relevant substantive antitrust expertise and who seek involvement in the administration's shaping of economic policy.<sup>73</sup> In a discussion that addressed appointments to the FTC and to the Department of Justice ("DOJ") Antitrust Division, the ABA Transition Report stated:

[T]he continued appointment of such knowledgeable individuals, who will be best positioned to gain the respect of the career staff at the agency, the private bar, [and] the business community . . . can lead to better [staff] morale, more credible enforcement decisions, and a greater ability for the agencies to engage with the private sector regarding substance and process in ways that improve enforcement overall. Such officials also would have the stature and reputations necessary to gain the respect of, and engage effectively with, enforcers around the world. . . . With such credibility, agency leadership also may have some success in obtaining opportunities to provide valuable input regarding antitrust and consumer protection to economic policymakers in the new Administration.<sup>74</sup>

The discussions with foreign competition and consumer protection agencies identified a noteworthy respect in which the pattern of appointments to the FTC departs from the practice of appointments overseas. Many of the heads of foreign competition and consumer protection agencies are economists. Only once in the FTC's history has an economist (James C. Miller III) served as the Chairman. Only three individuals with doctorates in economics (Miller, George Douglas, and Dennis Yao) have been FTC Commissioners. Accounting for trends in international practice and reflecting on the substantial economic dimension of the FTC's charter, it is reasonable to ask whether the agency is well served by such infrequent participation by economists at the top management level of the agency.

Below the Commissioner level, the FTC has three bureaus broadly divided along mission lines,<sup>75</sup> seven regional offices (one of which has two branches), and several other

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<sup>72</sup> This commentary is reviewed in William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915 (1997) [hereinafter Kovacic, *Quality*].

<sup>73</sup> ABA TRANSITION REPORT, *supra* note 11, at 11-12.

<sup>74</sup> *Id.*

<sup>75</sup> By comparison, the Australia Competition and Consumer Commission, which enforces consumer protection and competition laws and also has regulatory responsibilities for national infrastructure industries such as telecommunications, energy, water, and transportation, organizes some of its work along

offices, most prominently, in terms of size, the Office of the General Counsel and the Office of the Executive Director.

The Bureau of Competition (“BC”) focuses primarily on enforcement of the FTC Act’s prohibition of unfair methods of competition in the realm of antitrust and other competition laws. BC is divided into nine divisions: four divisions, organized around sectoral lines, specialize in merger enforcement; one handles health care-related competition concerns, including but not limited to mergers; one focuses on anticompetitive practices; one oversees compliance with orders issued in administrative or court cases brought by the Commission; one focuses on premerger notification; and one focuses on competition policy.

The Bureau of Consumer Protection (“BCP”) attends to the FTC’s mission concerning the FTC Act’s prohibition of unfair or deceptive acts or practices in or affecting commerce. BCP has seven divisions, five of which focus on direct law enforcement and compliance. Those divisions work in the areas of national advertising; financial practices; deceptive marketing of goods and services; privacy and identity protection; and enforcement of outstanding Commission and judicial orders, certain trade regulations and rules, and other targeted initiatives, such as green marketing. The other two divisions focus on support for BCP programs. One provides litigation support, data sharing (through the Consumer Sentinel Network) and analysis, and management of the Consumer Response Center, which responds to consumer complaints; the other division implements the Commission’s expansive consumer and business education programs.

The agency’s seven regional offices engage in consumer protection and competition enforcement under BCP and BC oversight. One of those offices, the Western Regional Office, has branches in two cities (Los Angeles and San Francisco).

The Bureau of Economics (“BE”) supports both the competition and consumer protection enforcement work of the bureaus and carries out much of the agency’s research mission. BE has two groups that focus on antitrust matters and one that focuses on consumer protection matters. It also has an office of applied research and outreach, which coordinates BE’s policy R&D, advocacy, and international activities, as well as an office of accounting and financial analysis, which focuses on mergers and other competition issues. The Commission has always assigned its economists to a separate unit and, from that unit, the economists provide independent economic advice to the Commissioners.

The Office of General Counsel represents the Commission in appellate matters and certain types of court actions, consults with or advises the bureaus on other court actions, and assists the Justice Department in representing the Commission in cases within the DOJ’s purview. The office includes a Policy Studies shop that prepares comprehensive reports on vital legal issues and on major sectors of the American

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industry lines (such as the work related to regulated sectors and price surveillance). Similarly, the European Commission’s DG Comp has engaged in a widespread reorganization into sector-specific project groups (excluding cartels).

economy, as well as a Legal Counsel shop that provides legal services to the entire agency concerning such matters as agency jurisdiction, rulemaking authority and procedures, employment law, government ethics, agency regulatory obligations, and information disclosure.

Several other offices perform additional functions that support the Commissioners and bureaus. These include the Office of International Affairs (“OIA”); the Office of Policy Planning (“OPP”); the Office of Public Affairs and the Office of Congressional Relations (both attached to the Chairman’s office); the Office of the Executive Director; and the Office of the Secretary. The Office of the Administrative Law Judges includes the Commission’s Administrative Law Judges (“ALJs”), who preside at trials at the direction of the Commission. The Office of the Inspector General (“IG”), an independent office within the Commission, conducts audits and investigations relating to the programs and operations of the FTC. The IG conducts audits to find and prevent fraud, waste, and abuse and to promote economy, efficiency, and effectiveness within the agency.

From approximately 1954 to 1960, the FTC divided its staff into bureaus along functional lines, one consisting of investigational staff and the other consisting of trial staff.<sup>76</sup> After 1960, the agency was reorganized into, among other units, a Bureau of Restraint of Trade and a Bureau of Deceptive Practices.<sup>77</sup> In 1970, under the leadership of Chairman Caspar Weinberger, the agency renamed the operating bureaus to their current titles of the Bureau of Competition and the Bureau of Consumer Protection, respectively.<sup>78</sup> Divisions within BC and BCP have both investigative and litigation responsibilities in particular subject matter areas.<sup>79</sup> Following the structural changes in the early 1970s, a number of commentators have noted that the budget for the Bureau of Consumer Protection substantially increased and BCP focused more heavily on matters of greater importance to consumers.<sup>80</sup> Likewise, the restructured Bureau of Competition is regarded as having become more effective and made great inroads in antitrust enforcement.<sup>81</sup> Also, one commentator stated that, after the restructuring of the early 1970s, the FTC was able to recruit more skilled attorneys than it had previously.<sup>82</sup>

On the whole, the FTC’s current structure of operating units has worked well. The external consultations with foreign agencies revealed many instances in which other

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<sup>76</sup> See ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY 113 (1980); FTC, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1954, at 7-8 (1955), available at <http://www.ftc.gov/os/annualreports/ar1954.pdf>.

<sup>77</sup> KATZMANN, *supra* note 76, at 113.

<sup>78</sup> *Id.* at 114-15.

<sup>79</sup> *Id.*

<sup>80</sup> KENNETH W. CLARKSON & TIMOTHY J. MURIS, THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 63 (1981).

<sup>81</sup> *Id.* at 61-62.

<sup>82</sup> KATZMANN, *supra* note 76, at 116.

countries have made organizational changes that directly have emulated features of the FTC's existing organization or have been influenced by the FTC's experience.

More important than the FTC's organization at any one time has been the development of a healthy custom that promotes reassessment and adjustment of existing organizational arrangements in light of past experience and emerging needs. When this process has identified possibilities for useful modifications, the FTC's administrative structure and its organization of bureaus have proven to be highly adaptable and flexible. New divisions or other subunits can be, and have been, created in response to changes in marketplace conditions or perceived agency needs.

Four recent examples illustrate how the agency has upgraded its structure in order to carry out its mission more effectively. In 2004, BCP established a Criminal Liaison Unit ("CLU") to work with federal and state law enforcers to facilitate criminal prosecution of pernicious forms of fraud. In 2006, the Commission established the Office of International Affairs, mentioned above, to improve the coordination of international matters within the agency and to provide a clearer focal point for contact by the FTC's foreign counterparts. In 2007, the agency altered BCP to form the Division of Privacy and Identity Protection out of the Division of Financial Practices. This move has enabled the FTC better to address consumer-related financial-privacy concerns, while also improving the focus on the issues that remained in the Division of Financial Practices. In 2008, the Bureau of Economics established a research unit to oversee BE research that will have impacts across all areas of enforcement. Short-term needs, moreover, can be met without restructuring, such as when attorneys from one BC division are assigned to work on another division's projects when the ebb and flow of work calls for such assignment.

One roundtable panelist expressed a cautionary note for any agency considering changing its structure, observing that when agency restructuring takes place, the agency should seek to resolve existing problems, rather than relocating problems from one division to another. He explained:

What you're striving for, I think, in terms of performance is more about building capacity and capacity to do the old things in very new, different, agile and better ways. So, I think you have to think about it in those terms. And in some cases, it's going to be about doing new things that need to be done, as well, things you may not have done in the past. But, again, traditional restructuring is not going to eliminate those problems. It's not going to prevent them from reoccurring. The restructuring kind of remedy, again, simply relocates problems from one division or one bureau or one segment to another. It really is not the solution.<sup>83</sup>

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<sup>83</sup> Breul, 7/30 DC Tr. at 14.

This comment correctly points out that reorganization by itself cannot solve deeper systemic problems that afflict an organization. Reorganization for its own sake also can breed cynicism among career professionals who have watched a long series of new agency managers alter the organization chart in ways that yielded few enduring improvements in the FTC's performance.

At the same time, attentiveness to possibilities for structural enhancements can lead an agency to solve problems that are rooted in organizational flaws and can help turn even good programs into great programs. This is another area in which the Commission's efforts to benchmark itself with other agencies at home and abroad can be highly useful. Conversations with other federal regulatory commission officials during the course of the FTC self-study revealed that, even though the federal commissions confronted many of the same operational challenges, sharing across commissions about past experience was unusual. This is an area in which interagency cooperation, either informally or within the framework of a memorandum of understanding, could help the FTC and other federal commissions share know-how that would improve the performance of all.

The same can be said of foreign competition and consumer protection agencies. Many foreign authorities are engaged in exciting experiments with new forms of organization and new techniques for operational practice. Careful study of the experiences of foreign agencies with comparable mandates could enable the FTC to identify potentially useful modifications to its own arrangements. The potential benefits from interagency information sharing warrant the FTC's efforts to see that multinational organizations that address competition or consumer protection issues expand the attention they give to questions of agency organization and operations.

## **B. Looking Ahead: Significant Issues Involving the FTC's Structure and Operations**

The FTC's self-study consultations demonstrated that organizational adaptability and an ethic of continuous institutional improvement are major characteristics of good agency performance. As the discussion above indicates, a useful way to strengthen the agency's effectiveness is to sustain the modern custom of refining the agency's structure and operations. As they have in the past, the Commission and its operating units can best achieve needed refinements through a regular, continuous process of assessment through which the Commission and its operating units – using such means including budgeting exercises, leadership retreats, and benchmarking with other institutions – seek to identify possibilities for improvement.

In this section we present several focal points for refinement. One involves the integration of competition and consumer protection missions within a single agency. A related issue, which the dual mission especially implicates, is communication and coordination across agency components. This is particularly important for the nonenforcement activities of the agency, which can be effective tools to shape policies

across practice disciplines. A further significant structural issue is the proper role of administrative adjudication in the agency.

## 1. Integration of Competition and Consumer Protection

Because the core mission of the FTC is to protect consumers by ensuring that markets work well, the agency must assess how a government agency can aid consumers and the market through its actions. The ABA Transition Report recently observed, “Given our free market economy, antitrust and consumer protection should be recognized as critical parts of any administration’s economic policies, and new agency officials should not be shy about contributing to discussions surrounding such policies.”<sup>84</sup>

Shared authority is a common condition of the FTC’s competition and consumer protection missions. The Department of Justice has jurisdiction to enforce the antitrust laws, and agencies such as the Consumer Product Safety Commission, the Federal Communications Commission, the Food and Drug Administration, and the Federal Reserve Board have jurisdiction over some consumer protection laws. However, the dual missions that fall under the “unfair or deceptive acts or practices” and “unfair methods of competition” standards within the FTC Act make this agency particularly well suited to address the interplay between consumer protection and competition.<sup>85</sup> The Commission’s capacity to meld expertise in economics, competition, and consumer protection is a conscious element of its institutional design and a major reason for its existence.<sup>86</sup>

Former Chairman Muris has described the dual missions as complementary elements of the same mission: “The policies that we traditionally identify separately as ‘antitrust’ and ‘consumer protection’ serve the common aim of improving consumer welfare and naturally complement each other.”<sup>87</sup> This is because “competition presses

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<sup>84</sup> ABA TRANSITION REPORT, *supra* note 11, at 12.

<sup>85</sup> Foreign authorities that have a dual competition and consumer protection mandate include the Australia Competition and Consumer Commission, the Korea Fair Trade Commission, Colombia’s Superintendence of Industry and Commerce, the Jamaican Fair Trade Commission, Peru’s National Institute for the Defense of Competition and the Protection of Intellectual Property, Poland’s Office for Competition and Consumer Protection, the Taiwan Fair Trade Commission, and the U.K. Office of Fair Trading.

<sup>86</sup> See Peeler, 7/30 DC Tr. at 134.

<sup>87</sup> Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Prepared Remarks at The Fordham Corporate Law Institute’s Twenty-Ninth Annual Conference on International Antitrust Law and Policy, at 3 (Oct. 31, 2002), available at <http://www.ftc.gov/speeches/muris/021031fordham.pdf>. With reference to the Commission’s unfairness jurisdiction, traditionally the most expansive part of its consumer protection jurisdiction, Muris gave some examples that show how a choice analysis can work: “The primary purpose of the Commission’s unfairness authority is to protect consumer sovereignty by attacking practices that impede consumers’ ability to make informed choices. Consumer sovereignty may be frustrated ex ante if, for example, important information is not provided. See *Labeling and Advertising of Home Insulation*, Statement of Basis and Purpose, 44 Fed. Reg. 50218 (1979). It may be frustrated ex post if sellers do not honor their contracts with consumers. See *Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d sub nom, FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988). The three-part unfairness test – the injury must be (1) substantial, (2) without offsetting benefits that outweigh the harm, and (3) one that

producers to offer the most attractive array of price and quality options,” and “consumer protection works to ensure that consumers can make well-informed decisions about their choices and that sellers will fulfill their promises about the products they offer.”<sup>88</sup> Former Commissioner Leary has described the two missions as complementary missions that address distortions to the supply side of the market in the case of competition and distortions to the demand side in the case of consumer protection.<sup>89</sup>

The FTC self-study consultations abroad revealed similar perspectives. Sir John Vickers, the former Chief Executive of the U.K. Office of Fair Trading, observed, “Consumer policy and competition policy are logically and institutionally intertwined.”<sup>90</sup> Vickers described consumer policy as addressing issues of consumer duress and undue pressure, prepurchase information problems, and undue surprises postpurchase, and he described competition as a means to mitigate these problems.<sup>91</sup>

A recent symposium on the interplay between competition and consumer protection policies also focused on the integration of these two disciplines.<sup>92</sup> The interplay between the two is widely recognized and takes many forms. For example, some authors have suggested that competition benefits consumers by driving all information (including adverse information) out into the open under what has historically

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consumers cannot reasonably avoid – specifically is designed to provide a rational, empirical means to determine whether the challenged acts or practices interfere with consumers’ ability to make choices.” *Id.* at 5 n.10.

<sup>88</sup> *Id.* at 3, 4 (“Competition cannot work effectively unless customers are reasonably well informed about the choices before them. Uninformed choice is not effective choice, and without that there will not be effective competition. Informed choice has two elements – knowing what alternatives there are, and knowing about the characteristics of alternative offerings. In particular, what matters is the ability of customers to judge the prospective value for money, for them, of the alternatives on offer.”).

<sup>89</sup> Thomas Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147, 1148 (2005).

<sup>90</sup> John Vickers, FBA, *Economics for Consumer Policy*, British Academy Keynes Lecture, at 1 (Oct. 29, 2003), available at [http://www.offt.gov.uk/shared\\_offt/speeches/spe0403.pdf](http://www.offt.gov.uk/shared_offt/speeches/spe0403.pdf). Vickers observed:

Competition is pro-consumer for the simple reason that rivalry among suppliers to serve customers well is good for customers. In such rivalry, the suppliers who serve customers best will prosper and those that serve them poorly will not. By the incentives that this process gives to all firms, and by selecting the better from the poorer, efficiency and productivity in the economy as a whole are promoted. This is productivity in the properly consumer-oriented sense of Adam Smith: “Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.”

*Id.* at 4-5 (citing Adam Smith’s *Wealth of Nations*).

<sup>91</sup> *Id.* at 2-4.

<sup>92</sup> See Paul A. Pautler, *Consumer Protection Policies, Economics, and Interactions with Competition Policy*, 4 COMPETITION POL’Y INT’L 83 (2008).

been called the unfolding principle.<sup>93</sup> This happens only if the information is not too expensive and if consumers demand it.<sup>94</sup>

Discussion today about dual-purpose agencies with competition and consumer protection portfolios focuses heavily on what form of intervention serves to maximize consumer welfare. One author observes that, although competitive markets generally provide consumer protection solutions without government intervention, in some markets consumer welfare is not maximized despite a high level of competition.<sup>95</sup> For example, markets in which some groups of consumers bear the costs of other consumers being either over- or underinformed, as well as competitive markets in which additional competitors bring new information that adds to consumer search costs in sifting both new information and avoiding deceptive claims, may be instances in which competition does not actually maximize overall consumer welfare.<sup>96</sup> The author suggests that public intervention could require certain disclosures that would foster price and quality transparency and correct for identified information gaps.<sup>97</sup> He qualifies this policy suggestion with the admonition that any such policy should be implemented only after rigorous study and cost-benefit analysis confirms that such intervention would benefit consumers.<sup>98</sup>

In asserting that competition and consumer protection policy serve the same purpose, former BCP Director William MacLeod has explained the distinction as being one of technical form: competition policy seeks to maximize consumer choices while consumer protection “seeks to ensure that customer choices . . . are not distorted by deception, misstatements or mistreatment of customers.”<sup>99</sup> This presents challenges in aligning the two policy areas, and agencies need to make the effort to ensure that competition and consumer protection policy actions do not run counter to one another.<sup>100</sup> MacLeod states that this ultimately can be achieved when both disciplines place emphasis first on consumer interests, without taking away the primary focus of competition policy as protecting competition and not competitors.<sup>101</sup>

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<sup>93</sup> *Id.* at 87 (citing Howard J. Beales, III, *Consumer Protection and Behavioral Economics: To BE or not to BE?*, 4 COMPETITION POL’Y INT’L 149 (2008); Paul H. Rubin, *Regulation of Information and Advertising*, 4 COMPETITION POL’Y INT’L 169 (2008)).

<sup>94</sup> *Id.*

<sup>95</sup> Mark Armstrong, *Interactions between Competition and Consumer Policy*, 4 COMPETITION POL’Y INT’L 97, 102-12 (2008).

<sup>96</sup> *Id.* at 112.

<sup>97</sup> *Id.* at 112-25.

<sup>98</sup> *Id.* at 144.

<sup>99</sup> William MacLeod, *The Interface between Competition and Consumer Policies*, Contribution from BIAC, OECD Global Forum on Competition, at 3 (Feb. 13, 2008), available at <http://www.oecd.org/dataoecd/31/56/40080545.pdf>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 6-7.

Roundtable panelist Sir Jeremy Lever suggested that consumer protection follows as a result of competition policy, and although competition and consumer protection are not the same discipline, competent competition agencies may enforce both laws.<sup>102</sup> Lever cited Muris, who has written that the same government agency need not necessarily handle competition and consumer issues; “[c]ompetition and consumer protection agencies, however, should recognize the complementary nature of their missions. Around the world, this recognition is growing.”<sup>103</sup> A recent background note for an Organization for Economic Cooperation and Development (“OECD”) discussion examined the tension that exists in comparing the intellectual underpinnings of competition and consumer protection policies:

That consumer protection policy and competition policy are largely interdependent instruments of economic policy, both aimed at serving a common purpose of enhancing the efficiency with which markets work, has been stated on many occasions and is widely accepted. It is also widely recognized that there can be, and at times are, tensions between those policies. Moreover, as a practical matter, there are differences in how those policies work, and in the nature of the process by which decisions are taken and implemented. Recognition of these interdependencies and of the differences leads naturally to a consideration of the institutional arrangements for these policies and specifically, of how they should be coordinated.<sup>104</sup>

A key inquiry for an FTC self-assessment is what level of integration of competition and consumer protection activities should exist to best achieve the agency’s overall mission. On this question, a former bureau director and a former deputy director both suggested that the FTC has a way to go and that the bureaus are too much like “silos” – that is, they operate side by side, but do not interact with each other sufficiently.<sup>105</sup> To resolve this, former BCP Director Jodie Bernstein suggested that BE take the lead in identifying issues that may involve both of the other bureaus and that an ad hoc group could be formed to address such issues and come back to the Commission with a recommended course of action.<sup>106</sup> Similarly, former OPP Director Susan DeSanti urged that the Commission establish a centralized structure, such as a policy office, to coordinate the research and policy development taking place in the three bureaus.<sup>107</sup> In

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<sup>102</sup> Lever, London Tr. at 137.

<sup>103</sup> Muris, *Principles*, *supra* note 17, at 174.

<sup>104</sup> Henry Ergas, *The Interface between Competition and Consumer Policies*, OECD Background Note, OECD Global Forum on Competition, at 3 (Jan. 24, 2008), available at <http://www.oecd.org/dataoecd/25/28/39890230.pdf>.

<sup>105</sup> Bernstein, 7/29 DC Tr. at 43; T. Schwartz, Chicago Tr. at 90.

<sup>106</sup> Bernstein, 7/29 DC Tr. at 37-38.

<sup>107</sup> DeSanti, 7/29 DC Tr. at 128-30.

2007, the FTC did this for international work, integrating the international competition, consumer protection, and technical assistance functions into the Office of International Affairs.<sup>108</sup>

The experience of foreign counterparts with integration of competition and consumer protection functions may prove useful for the FTC.<sup>109</sup> At least 30 agencies worldwide have a mix of these duties. Compared to the FTC, some dual-mandate agencies have undertaken more expansive organizational measures to integrate the competition and consumer functions more completely. The most notable is the U.K.'s Office of Fair Trading, which in 2006 restructured itself to integrate the agency's competition and consumer protection investigative and policy divisions, with staff responsible for both competition and consumer protection matters. Consultations with the OFT suggest that the integration of functions has led to greater consistency in outcomes and better use of available tools, with clear benefits in the areas of market studies and behavioral economics in particular.<sup>110</sup> Other agencies such as the Australian Competition and Consumer Commission integrate competition and consumer policy in divisions with specific sector responsibilities. The Canadian Competition Bureau integrates competition and consumer protection by rotating staff between the competition and consumer protection divisions. Equally important is to examine the agencies moving away from integration, including the experience of the European Commission, France, India, and Japan, where the agencies separated (or are in the process of separating) their consumer protection and competition functions, maintaining linkages only at a policy level rather than at an operational level.<sup>111</sup>

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<sup>108</sup> OIA was established on January 2, 2007. It brought together the functions and personnel formerly in the International Antitrust Division of the Bureau of Competition, the Division of International Consumer Protection of the Bureau of Consumer Protection, and the International Technical Assistance Office of the Office of the General Counsel. The OIA Director reports directly to the Chairman and works closely with all of the FTC's component organizations. OIA has three Deputy Directors, who are responsible for the international antitrust, consumer protection, and technical assistance functions.

<sup>109</sup> The FTC took a leadership role in the multilateral discussion on this topic at a February 2008 OECD meeting. Submissions for this discussion are available at <http://www.oecd.org/dataoecd/22/34/40898016.pdf>. In-depth FTC submissions to earlier OECD programs on the linkages between competition and consumer policy are available at <http://www.ftc.gov/bc/international/docs/US%20FTC%20paper%20on%20identifying%20and%20tackling%20dysfunctional%20markets.pdf> and [http://www.ftc.gov/bc/international/docs/Comp-ConsumerPro%20jnt%20rndtbl\\_2003%20Oct\\_US%20paper.pdf](http://www.ftc.gov/bc/international/docs/Comp-ConsumerPro%20jnt%20rndtbl_2003%20Oct_US%20paper.pdf). At the Paris roundtable, Zoltan Nagy encouraged the FTC to do more technical assistance in the area of the interface of competition and consumer policy. Nagy, Paris Tr. at 45.

<sup>110</sup> Consultation with OFT, Sept. 11, 2008.

<sup>111</sup> For example, as noted above, the European Commission has separate directorates for competition (DG Comp) and consumer protection (DG SANCO). This largely reflects the underlying arrangements in most member countries, in which the consumer and competition authorities are separate. The two directorates do, however, coordinate on policy issues, including issues such as e-commerce and consumer redress. See, e.g., Hon. Meglena Kuneva, European Commissioner for Consumer Protection, *Consumer and Competition Policies – Both for Welfare and Growth*, Address before OECD Global Forum on Competition (Feb. 22, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/95&format=HTML&aged=1&language=EN&guiLanguage=en>.

Regardless of the variety of arrangements throughout the world, the FTC's dual-function structure is a core component of its existence. The FTC in some ways may be a leader in both of these areas. Continuing, useful focal points of the agency's attention in the years ahead include (1) whether the dual missions are adequately integrated among the leaders and staff of the agency, and (2) ways to improve such integration. In addition to its own internal review, there will be much for the FTC to learn from the experience of agencies such as Canada's Competition Bureau and the OFT, both of which have undertaken ambitious measures to integrate the two functions.

## **2. Coordination and Communication throughout the Agency**

A longstanding concern of students of public administration is the skill with which the individual components of an institution share information with each other and otherwise coordinate their activities. The need to achieve effective intra-agency information flows and cooperation is a matter of particular importance for the FTC. Among other reasons, this is a function of the Commission's dual-purpose mission and its portfolio of research capabilities and other policy instruments that may be used by multiple agency units. Whether the agency is consistent in communicating the central tenets of the competition and consumer protection missions to agency staff and to outside stakeholders is an indicator of its likely success in achieving its mission.

Foreign counterparts to the FTC have developed innovative mechanisms to encourage internal information sharing. For example, the U.K. Office of Fair Trading has a central "Know-How" team to disseminate agency research, policy efforts, and other work. The OFT also uses a "knowledge sharing board," which consists of a public folder in all staff inboxes where staff can post inquiries to determine who at the agency has worked in particular areas or to obtain sample work product from their colleagues.<sup>112</sup>

Panelists identified industry self-regulation as an area in which competition and consumer protection interests will inevitably intersect and where cross-bureau communication may considerably help in obtaining beneficial policy results.<sup>113</sup> Assessment of the competitive restraints that may flow from self-regulation often turns on the legitimacy and importance of the consumer protection interest that produced the self-regulatory initiative. The FTC – given the dual nature of its mission – is in a unique position to balance the competing interests and promote self-regulation that fulfills the consumer protection need without unnecessarily harming competition.

Panelists also discussed ways to integrate the agency's disciplines through bureaus and offices outside the Bureau of Competition and the Bureau of Consumer Protection. For example, former BCP Deputy Director Teresa Schwartz recommended that the role of economists in the area of consumer protection should be more pronounced

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<sup>112</sup> Consultation with OFT, Sept. 11, 2008.

<sup>113</sup> See MacLeod, 7/30 DC Tr. at 190-93; Peeler, 7/30 DC Tr. at 166, 193-94.

in practice, if not in the structure of the agency.<sup>114</sup> She also suggested that the FTC would benefit from improving its economic tools and analysis with respect to consumer behavior and the application of behavioral economics.<sup>115</sup>

These suggestions are consistent with those made by other commentators who encourage more integration of economists in agency activities. In a recent article, former BE Director Luke Froeb, current BE Deputy Director Paul Pautler, and former EC Chief Competition Economist Lars-Hendrik Röller discussed the importance of integrating and employing BE's tools in agency decision making at all levels.<sup>116</sup> They note that the FTC is a functional organization, meaning that it is divided by certain subject areas to maximize economies of scale.<sup>117</sup> The FTC hires specialized econometricians to analyze specific problems and relies on staff economists to provide critiques and assessments of cases, as well as to undertake ongoing research.<sup>118</sup> The authors posit that the disadvantage of this design is in its potential impact on coordination between lawyers and economists, which can be fixed with stronger horizontal contacts across practice areas.<sup>119</sup> They concluded that including economists in communication throughout the agency is essential in coordinating enforcement and policy decisions.<sup>120</sup> Much as Bernstein and Schwartz said, Froeb, Pautler, and Röller also suggested that incorporating economists into the mainstream workings of the agency both fosters high-quality economic analysis and promotes better communication of that analysis to the agency decision makers.<sup>121</sup>

Panelists also addressed the diversity of policy offices across the agency. Susan DeSanti, former Director of Policy Planning and then Deputy General Counsel for Policy Studies within the Office of General Counsel, explained that there are reasons for the existence of each policy office and that each one does slightly different things.<sup>122</sup> For example, some decentralization may ensure that policy work is more directly related to

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<sup>114</sup> T. Schwartz, Chicago Tr. at 54-56.

<sup>115</sup> *Id.*

<sup>116</sup> See Luke M. Froeb, Paul A. Pautler & Lars-Hendrik Röller, *The Economics of Organizing Economists* (Vanderbilt Law and Economics Research Paper No. 08-18, 2008) (forthcoming 2009 in *Antitrust Law Journal*), available at <http://ssrn.com/abstract=1155237>.

<sup>117</sup> *Id.* at 8-9.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 12.

<sup>120</sup> *Id.* at 4-5.

<sup>121</sup> *Id.* Until recent years, the FTC's Bureau of Economics had a relatively unique position vis-à-vis economists at many other competition and consumer protection agencies in that the BE Director reports directly to the Chairman of the agency and makes recommendations directly to the full Commission. As a result, economist input into enforcement and other decisions is not merely subsumed into recommendations controlled by attorneys or case handlers, as is the case at many other agencies. More recently, a number of competition agencies have been adopting the BE organizational model and giving the office of the chief economist a direct reporting line to the agencies' top leadership.

<sup>122</sup> DeSanti, 7/29 DC Tr. at 152-53.

the needs of the agency's operational units. DeSanti, however, suggested that the agency consider merging all the policy shops together into one.<sup>123</sup>

In sum, panelists and other commentators have observed that the FTC can improve its performance by building stronger links among the bureaus and other offices, such as between competition and consumer protection staff, as well as by including economists in all aspects of the agency's work. Some panelists suggested that a policy office could play a useful role in improving these links and disseminating important insights throughout the agency.

### 3. Placement of Economists within the Agency

As part of the FTC's functional organization, discussed above, the FTC's Ph.D. economists are organized together within its Bureau of Economics.<sup>124</sup> Except for a six-year period beginning in 1954, the Commission has had a separate economic unit since the agency opened its doors,<sup>125</sup> and almost all of the economists have been located in that organization. It is only since the 1970s, however, that the unit has been staffed primarily with Ph.D.-level economists.<sup>126</sup>

There are now over 100 competition agencies in the world, many of which have Ph.D.-level economists on staff. The mix of Ph.D.s and undergraduate degree economists varies substantially across the organizations. The larger and more prestigious agencies tend to have a more Ph.D.-intensive mix. In some instances, the economists work for attorneys, and in others they are combined in their own subgroup and report to economist managers. Economic resources also can be organized in a hybrid form, in which several economists are located in a head office, but economists also are sprinkled among the attorney staff with attorney review of economic work. Variants of this hybrid

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<sup>123</sup> *Id.* at 153. See also Salinger, 7/29 DC Tr. at 136 (questioning the existence of multiple policy shops at the FTC).

<sup>124</sup> This does not include a few attorneys in other offices who have a doctorate in economics as well as a law degree. In addition, a few attorneys have substantial graduate training in economics short of a Ph.D.

<sup>125</sup> In 1954, following the transition to the Eisenhower administration, the FTC underwent a reorganization and the economists were rearranged along with the rest of the agency. Chairman Edward Howrey moved the subset of economists who worked on mergers out of the Bureau of Economics and into the Bureau of Investigation, which put them under the supervision of attorneys working on cases. This organizational structure lasted for six years until Chairman Paul Rand Dixon and incoming BE Director Willard Mueller returned to the previous structure. While they were under the supervision of attorney/managers, the economists chafed at being supervised and having their recommendations filtered by attorneys. For a discussion of this period, see FTC Workshop, FTC History: Bureau of Economics Contributions to Law Enforcement, Research, and Economic Knowledge and Policy: Roundtable with Former Directors of the Bureau of Economics, at 19-20, 24-26, 73-76 (Sept. 2003) (transcript of roundtable) [hereinafter BE History Roundtable], available at <http://www.ftc.gov/be/workshops/directorsconference/docs/directorstableGOOD.pdf#page=1>.

<sup>126</sup> Jesse Markham has noted that Ph.D.s at the FTC numbered as few as five in the 1940s and 1950s. See Jesse W. Markham, *The Federal Trade Commission's Use of Economics*, 64 COLUM. L. REV. 405, 406 (1964). The move toward a Ph.D.-intensive staffing model began when Willard Mueller became BE Director in 1961. The transition was largely complete by the latter 1970s.

form exist at the Federal Communications Commission, the U.S. Government Accountability Office, and the EC's DG Comp.

As at other agencies with staff economists, economists at the FTC provide case support; as at some of these agencies, economists at the FTC also provide case evaluation and litigation support, and work on competition advocacy and policy-related research. To a considerable extent, the Commission has come to rely on BE to serve as the principal quality control agent with respect to the assessment of proposed enforcement measures. BE very capably analyzes the economic strengths and weaknesses of proposed cases, but it is not well disposed by training and experience to assess litigation risk. The Commission would be well advised to consider broader use of devil's advocate panels within the Bureau of Competition, a device the agency has used from time to time to test the quality of suggested enforcement matters.

Some agencies separate the case evaluation function to be done by a stand-alone set of reviewers (sometimes called a "second pair of eyes"). These "scrutiny panels" ordinarily involve peer review internally by a team of economists and attorneys. Variants of this approach are employed by DG Comp and the Office of Fair Trading. In others, like the FTC, the case support and case evaluation are combined in a "two hats" approach in which case evaluation and case support are both done by the same individual.<sup>127</sup>

Froeb, Pautler, and Röller note that the optimal form of economist organization depends in large part on what the decision makers want and what the task is. Team organization, which provides the strongest links among the various members, is clearly optimal for litigation support, where intense focus and speed are often required and policy analysis is a secondary goal at best. In that situation, the goal is simply to win the litigation game, which explains why attorney-led teams typically have been used for litigation.

For case analysis, decisions about bringing cases, and policy R&D, however, the FTC's existing model is more likely to provide the ultimate decision makers with high-quality economic analysis and relevant information focused on questions of interest to those decision makers. For these purposes, subordinating the economists to attorney managers is likely to improve the coordination and agreement between the economist and her manager, but it is also likely to have deleterious long-run effects of at least four forms: (1) the loss of influence or "voice" of economics on policy and case selection, (2) loss of an alternative information flow to the decision makers, (3) poorer staff skill retention, and (4) inefficient use of economists with specialized skills or knowledge.

The existence of specialized skills – for example, expertise in vertical theory, game theory, dynamic factors, econometrics, and specific industries – implies that

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<sup>127</sup> The DG Comp approach (and that of the U.K. OFT) is sometimes a bit more nuanced. The Chief Economist's office might assign one of its economists to the case team. In that instance, that individual would wear both hats; but the staff economist on the case team would wear only the case support hat.

economist staff should not be assigned to individual shops. Centralization allows the agency to make better use of specialized skills across the alternative uses.<sup>128</sup>

#### 4. Administrative Adjudication

Under Section 5(b) of the FTC Act, the Commission may challenge unfair or deceptive acts or practices and unfair methods of competition through administrative adjudication.<sup>129</sup> When the Commission determines that there is “reason to believe” that a law violation has occurred, the Commission can vote to issue a complaint setting forth its charges. If the respondent elects to contest the charges, the complaint is adjudicated before an ALJ in a trial-type proceeding conducted under the Commission’s Rules of Practice. The matter is prosecuted by FTC “complaint counsel,” which consists of staff from BC, BCP, or a regional office. Upon conclusion of the hearing, the ALJ issues an initial decision setting forth his findings of fact and conclusions of law and recommending either entry of an order to cease and desist or dismissal of the complaint. Either complaint counsel or respondent, or both, may appeal the initial decision to the full Commission.

Upon appeal of an initial decision, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order. The Commission’s final decision is appealable by any respondent against which an order is issued. The respondent may file a petition for review with any court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was employed. If the court of appeals affirms the Commission’s order, the court enters its own order of enforcement. The party losing in the court of appeals may seek review by the Supreme Court.<sup>130</sup>

Panelists shared a variety of opinions about the administrative adjudicatory process, and many suggested modifications to modernize and make the system more effective. Former General Counsel Stephen Calkins observed that elimination of the administrative adjudication feature would undermine the Commission’s special role.<sup>131</sup> Calkins explained:

[O]ne of the alleged comparative advantages of the Commission is that it can be an adjudicative body. And I do think that it is – it’s important for this agency to get it

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<sup>128</sup> One way to try to overcome some of the costs caused by scattering the economists would be to have a centrally run economist office responsible for hiring, evaluation, and training, but still retain the assignment of individuals to legal shops. (This is a part of the OFT’s approach.)

<sup>129</sup> 15 U.S.C. § 45(b). Under Section 13(b) of the Act, 15 U.S.C. § 53(b), the Commission also can seek relief in court. Section 13(b) allows the Commission to seek either a preliminary injunction (in aid of administrative litigation) or a permanent injunction (in lieu of administrative litigation).

<sup>130</sup> Additional information regarding FTC administrative adjudication is available at <http://www.ftc.gov/ogc/brfovrw.shtm>.

<sup>131</sup> Calkins, 7/30 DC Tr. at 105-06.

right, to make it work, because it's one of the reasons we have a Federal Trade Commission.<sup>132</sup>

Former BC Director Susan Creighton stated that administrative litigation is particularly well suited for the most difficult and challenging cases the Commission faces.<sup>133</sup> Darren Bowie, former BCP Assistant Director, echoed this sentiment, stating:

I think, as technology evolves and consumer protection continues to evolve, there are new areas that do require . . . thoughtful application of the Commission's expertise. Now, that also assumes that there are ALJs with the expertise along the lines of some of the earlier discussion. But I do think there is a place for Part III in consumer protection in these new areas.<sup>134</sup>

Some panelists suggested that administrative adjudication is not the proper forum for the FTC to pursue cases, as the process of having the FTC both issue the complaint and then become the appellate tribunal creates an appearance problem. For example, former BC Director William Baer suggested that there is an inherent problem when the process appears tilted as there is a reduction of the deference that a court would eventually pay to the FTC on appeal.<sup>135</sup> Former BC advisor Thomas Krattenmaker said he generally favors administrative adjudication but is concerned about the system's general effectiveness not only to assess critical facts but also to shape competition policy.<sup>136</sup> He pointed out that there sometimes is an appearance that outcomes are predetermined because the Commission acts as judge and jury relative to the complaint that the Commissioners themselves issued.<sup>137</sup>

Another criticism of FTC administrative adjudication involves the time it takes to complete the proceedings. Janet McDavid said that the slow pace of the proceedings undermines the effectiveness of administrative adjudication.<sup>138</sup> Baer suggested that the process needs to become faster – by eliminating steps, making the Part III process more focused, and reaching final agency decisions in a more timely fashion.<sup>139</sup> Thomas Campbell echoed this sentiment, suggesting that the process “takes forever” to yield

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<sup>132</sup> *Id.*

<sup>133</sup> Creighton, 7/29 DC Tr. at 77-79.

<sup>134</sup> Bowie, 7/29 DC Tr. at 106.

<sup>135</sup> Baer, 7/29 DC Tr. at 102-03. Baer emphasized this issue in the context of appointing a Commissioner to serve in the capacity of an ALJ. Although Baer recognized that the Administrative Procedure Act and the FTC Rules of Procedure permit this practice, he expressed the concern that a Commissioner who has had a role in evaluating the case serving as an ALJ adversely affects the perception of impartiality. *Id.*

<sup>136</sup> Krattenmaker, 7/30 DC Tr. at 100.

<sup>137</sup> *Id.* at 100-01.

<sup>138</sup> McDavid, 7/30 DC Tr. at 103-04.

<sup>139</sup> Baer, 7/29 DC Tr. at 99-100.

results.<sup>140</sup> Bowie, however, pointed out that federal court consumer protection litigation also can be very slow for nonfraud cases.<sup>141</sup> Furthermore, despite the time it takes, Baer stated that Part III as a process is helpful and does affect business practices, regardless of outcomes.<sup>142</sup> Krattenmaker suggested that the agency modernize Part III adjudication by adopting a policy of issuing narrow complaints with several determinations of fact already in place, setting strict instructions to ALJs to resolve specific disputes on facts, and keeping the process on a tight time frame.<sup>143</sup> Krattenmaker offered that modifying the system by narrowing the scope of the factual questions in cases may make it a more useful policy device.<sup>144</sup>

The Commission recently has adopted wide-ranging amendments to its rules of practice intended, in part, to expedite administrative litigation. Among other things, the new rules set a default time line (subject to modification in appropriate cases), anticipating that cases will go to trial within eight months of the Commission's complaint, with merger cases in which the Commission sought a preliminary injunction going to trial within five months. The rules also set a timetable for the Commission to decide cases within the former scenario within 100 days after the ALJ's initial decision, and the latter within 50 days.<sup>145</sup>

Panelists also discussed ALJ expertise in handling the types of administrative cases before them. Baer explained that the selection process is not designed to choose experts in competition or consumer protection law, but rather to appoint independent fact finders that may actually have little expertise in the areas of FTC enforcement.<sup>146</sup> Campbell expressed concern that the lack of relevant expertise on the part of the ALJs created a lack of confidence in their findings by the Commission.<sup>147</sup> He claimed that, unlike a federal or state court judge who is given deference on findings of fact, ALJs are not necessarily afforded such deference, as there have been several cases in which the Commission has outright rejected the ALJ's findings of fact.<sup>148</sup> This observation supports the sentiment expressed by other panelists that the issues presented to ALJs should be narrow questions of fact rather than expansive legal and policy questions.<sup>149</sup> Former BC Director Richard Parker echoed concern over ALJ selection and offered a

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<sup>140</sup> Campbell, Chicago Tr. at 110.

<sup>141</sup> Bowie, 7/29 DC Tr. at 105-06.

<sup>142</sup> Baer, 7/29 DC Tr. at 100 (explaining that despite the adverse result in *FTC v. Schering-Plough*, pursuing the action was important for policy reasons).

<sup>143</sup> Krattenmaker, 7/30 DC Tr. at 101-03.

<sup>144</sup> *Id.* at 101.

<sup>145</sup> The proposed revised rules and comments on such rules are available at <http://www.ftc.gov/os/2008/09/P072104nprmt3.pdf>.

<sup>146</sup> Baer, 7/29 DC Tr. at 100.

<sup>147</sup> Campbell, Chicago Tr. at 112-13.

<sup>148</sup> *Id.*

<sup>149</sup> Krattenmaker, 7/30 DC Tr. at 101.

solution to improving the ALJ ranks by drawing on antitrust and consumer protection attorneys to act as ALJs.<sup>150</sup> It bears noting, however, that the ALJ selection process is dictated by government-wide requirements and not by FTC rules or policy.

Looking ahead, the agency should determine what role Part III adjudication should play in advancing competition and consumer protection law enforcement and policy. In particular, the agency should consider when administrative adjudication is most appropriate, as well as ways to improve the adjudicatory process.

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<sup>150</sup> Parker, 7/29 DC Tr. at 103-04. In this vein, in its 2008 transition report, the American Antitrust Institute (“AAI”) has called for the next administration to select ALJs with prior experience in economics and antitrust, and recommended that the agency include ALJs in training efforts to build their knowledge in these and consumer protection areas. See AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 185 (2008) [hereinafter AAI TRANSITION REPORT], *available at* <http://www.antitrustinstitute.org/archives/transitionreport.ashx>.

### III. Agency Resources

The FTC's ability to achieve its mission depends in significant part on its allocation and management of personnel, capital, and information resources. As one commentator recently observed, "The failure to maintain adequate financial and human resources impedes the [FTC's and DOJ's] activities on a number of fronts."<sup>151</sup> This chapter examines how these three factors can broadly affect agency performance.

#### A. Personnel

How the FTC approaches recruiting, training, and retention of talented and competent personnel bears significantly on the agency's ultimate success. As roundtable panelists and commentators have discussed, a recurring topic in agency assessments is the caliber of the agency's professional staff.<sup>152</sup> One panelist emphasized the importance of having a competent staff<sup>153</sup> and observed that the agency needs to be "on top of [its] game" in hiring.<sup>154</sup> FTC leadership has made recruiting highly competent staff a high priority for the agency.<sup>155</sup> In recent years, the agency also has established new programs to provide individual career development counseling to enhance the skills of its attorneys, economists, and administrative professionals.

A related issue is determining by what criteria one should assess candidates for FTC employment. There does not appear to be any single objective criterion to determine whether or not staff is highly competent and skilled, although the factors likely include some combination of educational background, relevant industrial or practical experience, willingness to receive training, and a strong interest in the subject matter of the agency's work. Determining the ideal balance of these criteria has been the focus of recruiting efforts at various times in the FTC's history, and it has been altered at times to

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<sup>151</sup> ABA TRANSITION REPORT, *supra* note 11, at 12.

<sup>152</sup> *See, e.g.*, AMERICAN BAR ASS'N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 32-34 (BNA 1969) [hereinafter 1969 ABA REPORT]. In evaluating the agency 40 years ago, the ABA expressed concerns about hiring practices at the FTC when a director in the Bureau of Competition explained that he sought to hire attorneys "[w]ho had been out in the world for ten years or so and had come to appreciate that they were not going to make much of a mark – because they tended to be loyal and remain with the FTC." The ABA recommended that the hiring process be dramatically overhauled. *Id.*

<sup>153</sup> Breul, 7/30 DC Tr. at 39 (explaining: "You've really got to have the people and the capabilities, with the right skills and the right experience in the right place here to get on with those outcomes. And that's a huge challenge that is affected by, in many cases, limited FTE[s] or limited dollars.").

<sup>154</sup> *Id.*

<sup>155</sup> *See, e.g.*, *Conversation with Muris and Pitofsky*, *supra* note 27, at 850 (Pitofsky discussing responses of the agency to the concerns raised by the 1969 ABA Report); Muris, 7/29 DC Tr. at 30-31. This theme was echoed in the 2008 AAI Transition Report, which raised a concern relative to lawyers and other professionals and suggested that, as many senior career people approach retirement, given the income disparity between government and private sector employment, the agency needs to be cognizant of how it will recruit talented professionals in the future. *See* AAI TRANSITION REPORT, *supra* note 150, at 188.

address specific needs relative to the agency's agenda.<sup>156</sup> Given the evolution of competition and consumer protection policy, and changes in the tools of economic analysis, any self-assessment should consider how the agency can recruit and retain well-trained personnel in relevant areas of expertise, as well as how the agency trains and educates its existing staff to remain current in such areas.

One challenge to the agency's ability to recruit and keep professional staff is that the FTC, as a government agency, faces significant competition from private sector employers who typically can offer higher wages. The agency should continue to engage Congress in a discussion about the possibility for augmenting the existing federal pay scale to enable the FTC to make salary-based departures to the private sector less frequent. There is serious question about whether the Commission's capacity, and that of other public agencies in the United States, can be sustained at acceptable levels if compensation levels are not increased substantially.

To offset this pay disparity and recruit talented professionals, many panelists suggested that the FTC employ a combination of first-rate training and ample opportunities for staff to apply their skills and knowledge in interesting and innovative legal and policy areas. Former BCP Deputy Director Teresa Schwartz discussed how it is important to encourage staff to learn new things and to afford them opportunities to apply their skills.<sup>157</sup> Staff exchanges, as discussed in Chapter IV.D, are an extremely effective tool to exchange best practices, solidify bilateral relationships, and strengthen enforcement cooperation with foreign counterparts, as well as add to an employee's knowledge base and skills. Many foreign counterpart agencies use staff exchanges extensively as a way to promote staff development.<sup>158</sup>

Likewise, former BC Director Molly Boast suggested that creating a strong training and development program will not only help the FTC recruit talent, but it will also serve to improve staff morale and retain talented attorneys and economists at the agency.<sup>159</sup> The Commission has an extensive training program, including an agency-wide annual training program for new attorneys and economists. BCP also has implemented its own annual two-day training for new BCP attorneys to help them

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<sup>156</sup> See Historical Society of the District of Columbia Circuit, *Oral History Project: Robert Pitofsky*, *Esquire* 125 (Mar. 10, 2004) [hereinafter Pitofsky Interviews], available at [http://www.dcchs.org/RobertPitofsky/robertpitofsky\\_complete.pdf](http://www.dcchs.org/RobertPitofsky/robertpitofsky_complete.pdf) ("I wanted to educate a generation of competent lawyers, and I thought bringing in outsiders was the wrong way to do that. So that's senior staff. Junior staff – we were extremely active in reaching out to the law schools and to young people at law firms for exceptional people, and since there was the greatest merger wave in the history of the country going on, and much interest in what consumer protection could do about unwelcome phone calls, spam, deception and unfairness in the sale of computers, and so forth, it became quite an attractive place for young people."); see also Baer, 7/29 DC Tr. at 82.

<sup>157</sup> T. Schwartz, Chicago Tr. at 83.

<sup>158</sup> At the U.K. Office of Fair Trading, for example, in Fall 2008 there were 24 individuals visiting the agency on staff exchanges, and 17 OFT employees at other agencies. Consultation with OFT, Sept. 11, 2008.

<sup>159</sup> Boast, NY Tr. at 36-37.

understand everything they need to know to bring successful BCP cases. Annually, BCP also conducts a two-day litigation seminar at which staff discuss topics such as recent cases, litigation developments, electronic discovery, ethics, and other significant litigation topics. BCP management also encourages staff and management to take additional courses as needed. Additionally, BCP established a specialized “training academy” for staff that work on financial practices matters to teach topics such as the role of federal and state regulators of financial institutions, the mortgage business, fundamentals of credit reporting and credit scoring, payment cards and payment systems, and the legal framework of credit discrimination. Similarly, the Bureau of Competition sponsors ongoing annual classes for training staff attorneys, which are led by BC attorneys, economists and accountants from the Bureau of Economics, and private attorneys from around the country. The coursework includes classes on substantive topics such as the merger guidelines, statistics, and accounting, as well as intensive two-to-four-day practice sessions on depositions, evidence, and trial advocacy. BE has a seminar series that brings in academics doing work on topics of interest to the Commission, as well as occasional intensive courses for its staff, such as a recently held econometric course. Also, BE staff are encouraged to pursue research on topics of interest to the Commission and to present that work in professional settings, both of which serve to enhance staff skills.

Former BCP Assistant Director Paul Luehr projected that, over time, the importance of technical expertise for FTC staff will become more pronounced.<sup>160</sup> In particular, Luehr foresees an increased demand for attorneys with technical expertise:

I think it’s going to be more technical in terms of the level of skills that’s going to be required of the investigators and attorneys. That’s where the marketplace is going and that’s going to be a requirement despite all those kids who went to law school to avoid math. I think they’re all going to be numerically and technically oriented.<sup>161</sup>

Luehr forecast that the FTC will grow both in size and stature as a neutral broker with respect to consumer data and market analysis, likely resulting in better overall regulation and enforcement.<sup>162</sup> Another panelist encouraged the agency to direct resources to ongoing training to inform staff about complex issues of consumer protection as well as technological advances, to stay current on new scams, and to improve investigative skills.<sup>163</sup>

In the same vein of ensuring staff keep their skills current, former BC Director William Baer encouraged better use of the performance evaluation process, suggesting

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<sup>160</sup> Luehr, Chicago Tr. at 101.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Brauch, Chicago Tr. at 84-85.

that the agency consider whether it is a meaningful way to promote the knowledge and skill development of staff.<sup>164</sup> He favored using the process not solely to reward excellent performance but also as an opportunity to promote development in areas in which staff performance is “sub-excellent.”<sup>165</sup>

The London roundtable involved much discussion about developing talent within the agency. Former General Counsel Debra Valentine advocated that, rather than relying too heavily on outside academics to pursue research relevant to the FTC’s mission, “it is the agency’s obligation to develop a lot of that talent in-house and not farm it out.”<sup>166</sup> Having economic strength in-house is critical, as former OFT Chief Executive Sir John Vickers suggested, for no other reason than to have the ability to appraise critically the economic theories brought before the agency by outside parties.<sup>167</sup>

External consultations yielded several recommendations on how to improve the recruiting, training, and retention of skilled professionals at the FTC. How the agency meets the ongoing challenge of recruiting and retaining talented professionals will be a key factor in the agency’s success. An important step toward meeting this challenge is to confront the tension that arises when managers are told to achieve strong short-term operational results – for example, winning the case of the moment – and to invest in the long-term development of personnel they supervise. The top leadership of the Commission must ensure that incentives for managers related to salaries, promotions, and various agency awards reflect the importance to be paid to the career development of the professional staff.

## **B. Capital Resources**

In several respects, an agency’s budget dictates the deployment of its resources and thus dictates its ability to achieve its mission. Assessing an agency’s central budgeting concerns and operating principles is an essential component of understanding agency policy.<sup>168</sup> As one panelist phrased it, “The budget often does . . . associate outputs to dollars. Frankly, that’s okay because there is a relationship there and that works.”<sup>169</sup>

Bernard Martin has examined how federal agency leadership pursues an agenda that comports with the expectations of major stakeholders (for example, the executive branch) and communicates the agency’s agenda to staff and other stakeholders through

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<sup>164</sup> Baer, 7/29 DC Tr. at 92.

<sup>165</sup> *Id.*

<sup>166</sup> Valentine, London Tr. at 76.

<sup>167</sup> Vickers, London Tr. at 78.

<sup>168</sup> See Bernard H. Martin, *Office of Management and Budget*, in *GETTING IT DONE: A GUIDE FOR GOVERNMENT EXECUTIVES* 70 (Mark A. Abramson, Jonathan D. Breul, John M. Kamensky & G. Martin Wagner eds., 2008).

<sup>169</sup> Breul, 7/30 DC Tr. at 23.

the budget process.<sup>170</sup> Federal funding resources are limited, fiscal pressures are significant, and the sources for agency funding have become broader and more complex. Martin makes the point that, despite these pressures and complexities, to be successful, any agency leader must recognize that the budget – either one set by Congress or one managed within the agency – and policy are inseparable.<sup>171</sup> For these reasons, a well-planned and effective budget policy, including allocations within that budget, is essential for the success of any agency.<sup>172</sup>

The budget process is one tool with which to highlight a particular type of agency activity, such as policy research and development. Former Commissioner Thomas Leary discussed how various programs have greater priority if given greater prominence in the agency’s budget. In advocating for a greater emphasis on agency R&D, he stated: “I’ve always thought if we could rejigger the budget process to make [research and development] part of our core mission, I’d do it, just to emphasize how important it is.”<sup>173</sup> Another panelist echoed this sentiment when he discussed making a priority of internal program reviews and evaluations.<sup>174</sup> He explained that the success of such internal evaluations and their relevance to understanding what the agency has accomplished and their impact on future conduct will be directly linked to the budgetary emphasis they receive.<sup>175</sup> Former Chairman Timothy Muris agreed with such sentiments, but noted that the budget process is a tool within the Commission that historically has not been used “effectively” by agency leaders.<sup>176</sup>

If, as Bernard Martin has suggested, agency budgets and policies are inseparable,<sup>177</sup> the FTC’s budget must be able to strike a balance that both reflects agency priorities, as expressed to staff and external stakeholders, and is sufficiently flexible to respond to circumstances that require a shifting of budgetary priorities. For example, allocation of BCP resources among the many tools with which it pursues its mission – including enforcement actions, rulemaking, consumer and business education, policy R&D efforts, and promotion of industry self-regulation – has shifted at different times to meet different agency needs. Muris discussed how under his leadership privacy-related issues required additional resources, and flexibility to deploy budgetary assets to address these growing concerns enabled the agency to be on the forefront of many privacy issues.<sup>178</sup> Baer similarly explained that when he joined the agency in 1995, the FTC had

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<sup>170</sup> Martin, *supra* note 168, at 70.

<sup>171</sup> *Id.* at 71-72.

<sup>172</sup> *Id.*

<sup>173</sup> Leary, 7/29 DC Tr. at 27.

<sup>174</sup> Korsun, NY Tr. at 139.

<sup>175</sup> *Id.*

<sup>176</sup> Muris, 7/29 DC Tr. at 50.

<sup>177</sup> *See* Martin, *supra* note 168, at 71-72.

<sup>178</sup> Muris, 7/29 DC Tr. at 41-42, 54-55.

suffered a string of defeats in court; he thus sought to shift budgetary funds toward hiring specialized lawyers and training more attorneys to improve litigation skills.<sup>179</sup>

The Commission also can adjust its program priorities rapidly, as needed, to address new problems in the marketplace triggered or exacerbated by external events. For example, as the crisis in the housing market deepened, various businesses emerged with false promises that they could stop foreclosure or obtain a loan modification in exchange for a large upfront fee; in 2008, the Commission moved quickly to take legal action against several such operations, and developed needed educational materials to warn consumers how to avoid being victimized by rescue scams and how to obtain assistance from legitimate and reliable sources. Former Director of Policy Planning Susan DeSanti also discussed how budgetary resources could be focused to foster better sharing of information within the agency to avoid redundancy and ensure that research and enforcement resources are utilized most effectively.<sup>180</sup>

Drawing from the comments of roundtable panelists and commentators more generally, an analysis of the allocation of capital resources must extend beyond the simple question of “how much is our budget?” It needs to assess how the agency identifies areas for policy and enforcement emphasis, how leadership sets the policy through its budget allocation, and how the agency can adjust to meet challenges presented when political, social, and economic changes affecting the agency and its stakeholders occur.

### **C. Information**

The Commission needs information to detect problems, investigate them, and then, through litigation or otherwise, address them. Decisions concerning how to allocate personnel and capital resources are largely dependent on the information the agency obtains regarding marketplace conduct, mergers and other transactions, and legal, economic, and technological developments. How well the agency obtains information, the quality of the information it gets, and how it analyzes this information also must be considered in connection with the FTC’s effective use of personnel and capital resources.

By the end of the twentieth century, the volume of information coming to the FTC regarding potential enforcement targets or areas of concern for consumer protection had increased dramatically.<sup>181</sup> With the proliferation of telemarketing fraud in the 1980s and Internet fraud in the 1990s, the task of receiving and responding to complaints had become too large to be handled by attorneys and investigators, whose time was largely committed to conducting investigations and bringing enforcement actions. At the same

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<sup>179</sup> Baer, 7/29 DC Tr. at 82.

<sup>180</sup> DeSanti, 7/29 DC Tr. at 130.

<sup>181</sup> Information-related concerns often are framed in terms of whether the agency is getting enough information. One roundtable panelist, however, described the situation today as one of information overload, in which agencies have too much information and need to sort through it to determine which is useful and which is not. Breul, 7/30 DC Tr. at 40.

time, the advent of electronic databases enabled information tracking in a way never before possible, and the Commission became more active in seeking out information about new trends or potential problems before they emerged in the form of consumer complaints.

In response to the changes in the form, substance, and volume of marketplace information, the FTC opened its Consumer Response Center to fulfill increasingly important information gathering functions. Today, the agency receives and responds to thousands of consumer and business complaints or inquiries each week. Complaints are made available to FTC staff and other law enforcement agencies in the U.S. and worldwide through the FTC's Consumer Sentinel Network, a secure online database that includes not only complaints received by the FTC, but also by other selected government agencies and nongovernmental entities. The Consumer Sentinel Network is accessible only to law enforcement agencies, and about 1,700 such agencies worldwide are members.

Additionally, the advent of the Internet not only expanded marketing venues, but also has greatly facilitated advertising monitoring, particularly with the use of search tools that can focus on particular products or claims. Internet "surfs" are now a regular activity for BCP investigators, particularly with regard to claims for dietary supplements and other health-related products.<sup>182</sup> BCP's investigative leads also come from monitoring other media, competitor complaints, referrals by self-regulatory bodies, and other sources.

The Bureau of Competition gathers information about transactions and ongoing conduct in the marketplace primarily through specific statutory reporting requirements. Its main source of information comes from the Hart-Scott-Rodino Act<sup>183</sup> requirement that merging companies file certain data in advance of consummation. In general, a filing party is required to identify the parties involved and the structure of the transaction as well as provide certain documents, such as balance sheets and other financial data, and copies of documents that have been filed with the Securities and Exchange Commission. In addition, the parties are required to submit certain planning and evaluation documents that pertain to the proposed transaction. To evaluate such proposed transactions, BC often gathers information not only from the merging parties but also from competitors and other industry players to discern the competitive status of the industry affected by the merger. Also, on a much smaller scale, the FTC receives information about certain settlements between brand-name drug manufacturers and generic drug applicants pursuant to Title XI of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.<sup>184</sup>

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<sup>182</sup> See also *Conversation with Muris and Pitofsky*, *supra* note 27, at 789-90 ("Another creative use of technology devised by the Bureau staff was the Internet "surf," a way to search the online marketplace for deceptive practices. Over my term as Chairman, FTC staff, often in collaboration with many other enforcement agencies, conducted dozens of surf days, uncovering and following up on thousands of Web sites found to be engaged in deceptive practices.").

<sup>183</sup> 15 U.S.C. § 18a.

<sup>184</sup> Pub. L. No. 108-173, 117 Stat. 2066.

Apart from statutorily required filings, BC also gathers information to detect and investigate possible law violations through complaints from, and inquiries directed to, competitors, suppliers, and consumers.<sup>185</sup> It is not uncommon for lawyers in the antitrust bar to contact the agency on behalf of clients – sometimes in relation to nonreportable mergers or other conduct of concern to their clients – and identify conduct that may violate the antitrust laws. (One panelist cautioned against discounting or categorically ignoring complaining competitors as a source of case generation, explaining that, although not all competitor complaints are legitimate, they are a source of potentially useful information.<sup>186</sup>) Similarly, members of Congress send constituent complaints to BC regarding possible anticompetitive conduct observed in their jurisdictions. BC also uses an email notification system ([Antitrust@ftc.gov](mailto:Antitrust@ftc.gov)) and a complaint phone line to gather complaints that may warrant BC inquiry. FTC staff also have created a program to monitor competitive conditions in the gasoline industry, and they receive data regularly regarding prices and other conditions in the industry.<sup>187</sup> In addition, staff can glean relevant information from public sources.<sup>188</sup>

Further, in both the competition and consumer protection areas, the agency gathers relevant industry and marketplace information by convening conferences, workshops, and hearings to address current and emerging issues in these areas. Such events have become an important means through which the Commission and its staff identify problems and develop appropriate responses. In particular, they have allowed the FTC to solicit the views of experts and interested parties outside the agency – including those from industry, consumer groups, academia, and other federal, state, or local agencies – to help the Commission better understand its role and formulate the most appropriate responses in particular problem areas.<sup>189</sup>

The FTC also obtains information from other competition and consumer protection agencies, both foreign and domestic. Mutual sharing is facilitated by the

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<sup>185</sup> At one time, the FTC also gathered industry data through other programs, including most notably annual line of business program reporting that collected data on the economic performance of large U.S. firms. *See, e.g.,* F. M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461, 476-83 (1990). This program was stopped in the mid-1980s because agency leadership determined that the costs of the program outweighed the benefits. *Id.* at 480-85.

<sup>186</sup> First, NY Tr. at 61.

<sup>187</sup> BE staff receives daily data from the Oil Price Information Service, a private data collection company. Staff receives information weekly from the Department of Energy's public "Gas Price Hotline," and also reviews other relevant information that might be reported to the FTC directly by the public or by other federal or state government entities. An econometric model is used to determine whether current retail and wholesale prices each week are anomalous in comparison with historical data. Additional information regarding this program is available at [http://www.ftc.gov/ftc/oilgas/gas\\_price.htm](http://www.ftc.gov/ftc/oilgas/gas_price.htm).

<sup>188</sup> For example, former BC Director Richard Parker identified trade press and trade association bylaws as sources of potentially relevant information. Parker, 7/29 DC Tr. at 74-75.

<sup>189</sup> The FTC's policy research and development efforts, including the use of such events, are discussed in more detail in Chapter V.C.

Commission's broad authority to share information (including most materials subject to limits on public disclosure) with domestic law enforcement agencies.<sup>190</sup>

As to sharing with foreign agencies on competition matters, the FTC shares and obtains information from foreign counterparts pursuant to formal and informal arrangements that are consistent with the FTC's statutory obligations of confidentiality. Formal arrangements include bilateral cooperation agreements,<sup>191</sup> informal arrangements under an OECD Recommendation,<sup>192</sup> and agreements pursuant to the terms of the International Antitrust Enforcement Assistance Act of 1994 ("IAEAA").<sup>193</sup> Absent an IAEAA agreement (and the Commission has entered into an IAEAA agreement only with Australia) or the consent of the submitter (which is usually forthcoming),<sup>194</sup> the Commission cannot share most of its nonpublic submissions with foreign enforcers. Nevertheless, in addition to publicly available information that the FTC may share with foreign agencies, it also shares relevant information that it is empowered but not mandated to keep confidential. Such information can include the fact that an investigation is taking place, its subject matter, and agency analysis.

In addition to international information sharing through Consumer Sentinel, the FTC shares and obtains information from its foreign counterparts in consumer protection and privacy matters both informally and pursuant to formal bilateral cooperation agreements, bilateral and multilateral memoranda of understanding and other agreements, and through networks such as the International Consumer Protection and Enforcement Network and the London Action Plan. In 2006, the Commission's ability to cooperate with its foreign counterparts was enhanced by the U.S. SAFE WEB Act,<sup>195</sup> which amended the FTC Act. This law includes provisions that enable foreign law enforcement authorities and private entities more easily to provide information to the FTC in cross-border matters, including matters involving assets located in foreign jurisdictions that are subject to recovery by the

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<sup>190</sup> See, e.g., 15 U.S.C. § 46(f). Absent the consent of the submitter, however, the Commission cannot share submissions under the Hart-Scott-Rodino Act with domestic agencies.

<sup>191</sup> The United States has entered into bilateral agreements on antitrust cooperation that provide for information sharing with Germany (1976), Australia (1982 and 1999), the European Communities (1991 and 1998), Canada (1995 and 2004), Israel (1999), Japan (1999), Brazil (1999), and Mexico (2000). See FTC Office of International Affairs, International Antitrust and Consumer Protection Cooperation Agreements, <http://www.ftc.gov/oia/agreements.shtm>.

<sup>192</sup> OECD, RECOMMENDATION OF THE COUNCIL CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE (1995), available at [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(95\)130](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130).

<sup>193</sup> 15 U.S.C. §§ 6201-6212. The IAEAA allows the FTC (and DOJ) to enter into bilateral antitrust mutual assistance agreements with foreign governments that authorize the FTC (and DOJ) to share confidential information obtained in investigations and to use its investigatory powers to gather evidence on behalf of the other party to the agreement. See ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES 114 (2005).

<sup>194</sup> See International Competition Network, Waivers of Confidentiality in Merger Investigations, § 2.A., at 3-4, available at <http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf>.

<sup>195</sup> U.S. SAFE WEB Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372 (codified as amended in scattered sections of 15 U.S.C.).

Commission. The U.S. SAFE WEB Act also enables the FTC to obtain information for foreign consumer protection agencies and to share with such agencies most information otherwise subject to prohibitions on disclosure.<sup>196</sup>

Of course, like other enforcement agencies, the FTC also has enforcement-related authority to issue compulsory process, such as subpoenas and civil investigative demands. Apart from a particular investigation, however, the FTC also has unique powers to obtain information – in both competition and consumer protection matters – pursuant to Section 6 of the FTC Act.<sup>197</sup> Specifically, Section 6(b) empowers the Commission to require the filing of “annual or special . . . reports or answers in writing to specific questions” for the purpose of obtaining information about “the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals” of the entities to whom the inquiry is addressed.<sup>198</sup> The Commission’s 6(b) authority enables it to conduct wide-ranging economic studies that do not have a specific law enforcement purpose. Section 6 also authorizes the Commission, subject to applicable confidentiality constraints, to “make public from time to time” portions of the information that it obtains, where disclosure would serve the public interest.<sup>199</sup> Such disclosure typically takes the form of a report issued by FTC staff or the Commission.

The FTC used its 6(b) authority in several recent competition research efforts. For example, former Chairman Robert Pitofsky signed the 6(b) orders in April 2001 that led to a 2002 report on generic drug entry.<sup>200</sup> Other studies in which 6(b) orders were used include the 2005 study of pharmacy benefit managers and the impact, if any, of mail-order pharmacy ownership,<sup>201</sup> and a 2006 report on gasoline pricing manipulation

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<sup>196</sup> See 15 U.S.C. § 57b-2(f)(2) (confidentiality of material obtained from a foreign source); *id.* § 57b-2(b) (exemption from liability for voluntary provision of information); *id.* §§ 46(f), 57b-2(b)(6) (authorizing certain sharing with foreign authorities); *id.* § 46(j)(4) (international agreements).

<sup>197</sup> 15 U.S.C. § 46.

<sup>198</sup> *Id.* § 46(b).

<sup>199</sup> *Id.* § 46(f). Section 6(b) also allows the Commission to obtain answers to specific questions as part of an antitrust law enforcement investigation, where such information would not be available through subpoena because there is no document that contains the desired answers. *Id.* § 46(b). Confidentiality constraints often can be satisfied by publishing data in aggregated or anonymized form.

<sup>200</sup> FTC, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (2002), available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>. See *Conversation with Muris and Pitofsky*, *supra* note 27, at 777 (“In 2000 Bob reinvigorated the use of Section 6(b) authority and began the FTC’s influential study of entry by generic drugs. The study helped generate cases and resulted in a report . . . whose recommendations received a highly public endorsement from the President, induced regulatory reforms at the Food and Drug Administration (FDA), and inspired legislative amendments to the Hatch-Waxman Act.”).

<sup>201</sup> FTC, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (2005), available at <http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf>.

and post-Hurricane Katrina gasoline price increases.<sup>202</sup> In addition, the Bureau of Consumer Protection recently used such 6(b) special orders to obtain data from 44 food producers to measure the extent of food marketing to children and adolescents,<sup>203</sup> and from 12 alcohol suppliers to examine the placement of alcohol ads in various media.<sup>204</sup>

Whether the FTC uses its 6(b) authority in a particular context depends on whether there are important policy topics that require investigation that could not be done with publicly available or voluntarily submitted data. Certainly, responding to compulsory process requests (or even voluntary requests) may be a costly process for the respondent firms, and using the process can be time-consuming for the agency. It is, therefore, not undertaken lightly. Although recent use of the technique has been valuable to the agency in gathering relevant information, the benefits of any particular study are hard to estimate. As a result, any cost-benefit analysis involving the use of the agency's 6(b) powers necessarily involves a careful consideration of the burdens imposed on recipients of 6(b) orders, as well as the appropriate amount of agency personnel and capital resources to devote to such efforts.

Roundtable panelists provided several observations and recommendations regarding the FTC's information collection efforts. Beyond the formal methods discussed above, panelists identified other means to obtain relevant information and data on emerging issues in support of potential enforcement actions. Former OPP Director Susan DeSanti described how, following a staff meeting at which an information gap in an area under investigation was identified, one staff member simply reached out to another federal agency (outside the FTC's traditional jurisdiction) and forged an agreement to gather the necessary information, thus allowing the FTC to pursue a particular item on its enforcement agenda.<sup>205</sup> Former BC Assistant Director Joseph Kattan suggested improving information analysis by linking more closely the enforcement mission with the research mission, and tapping economics departments outside the agency to help produce this work.<sup>206</sup> Rebecca Fisher from the Texas Attorney General's office discussed how information is shared between the state attorneys general and liaisons at the FTC, which has helped both entities learn about conduct and share research and insights relative to issues important to both groups' constituents.<sup>207</sup>

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<sup>202</sup> FTC, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES (2006) [hereinafter FTC POST-KATRINA REPORT], *available at* <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>.

<sup>203</sup> FTC, MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION: A REPORT TO CONGRESS (2008) [hereinafter 2008 FOOD MARKETING REPORT], *available at* <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>.

<sup>204</sup> FTC, SELF-REGULATION IN THE ALCOHOL INDUSTRY: REPORT OF THE FEDERAL TRADE COMMISSION (2008) [hereinafter 2008 ALCOHOL SELF-REGULATION REPORT], *available at* <http://www.ftc.gov/os/2008/06/080626alcoholreport.pdf>.

<sup>205</sup> DeSanti, 7/29 DC Tr. at 132.

<sup>206</sup> Kattan, 7/29 DC Tr. at 140.

<sup>207</sup> Fisher, 7/29 DC Tr. at 194.

Information is one of the essential resources of the agency, and, as discussed above, the Commission has several methods to gather and analyze information needed to establish and pursue its priorities. Given the ongoing shifts in technology and data creation, however, the agency must continually evaluate its methods of obtaining the information necessary to maintain its effectiveness.

#### IV. The Agency's Relationships

The FTC has significant relationships with various types of external entities, including stakeholders and enforcement partners. The Commission is subject to oversight by Congress, which can legislate particular tasks, obligations, or limits on its activities. In part because of concurrent jurisdiction or related interests, the FTC interacts, in various ways, with federal, state, and foreign authorities. In addition, the FTC's broad jurisdiction over consumer protection and competition matters affects a wide array of industries and actors, making quite diverse the interests of consumer and business groups – and individual consumers and businesses – affected by the agency. Finally, relations with academia can substantially assist the Commission in fulfilling its mission.

Former BCP Director Jodie Bernstein explained that maintaining relationships with state agencies, congressional committees, consumer groups, industry groups, and others is essential to ensuring that stakeholders in the FTC have access to the agency.<sup>208</sup> Panelist Jonathan Breul also observed that networking and relationship building is an area of growing importance, and the degree to which an agency incorporates good networking into its practices may signal its ultimate success.<sup>209</sup> Breul also suggested that these relationships can help the agency anticipate surprises and that the FTC should have the ability to identify the stakeholders on any given issue.<sup>210</sup>

Three major policy considerations dictate extensive and augmented efforts by the FTC to build better links to other agencies. The first is that problems in economic performance that the FTC observes sometimes may be rooted in the policy choices of other government bodies. The first-best solution to an observed problem may be an adjustment in another policy regime. Closer relations with the relevant agencies can assist the FTC in encouraging other government bodies to make the desired policy change.

A second consideration involves the fact of shared or concurrent authority for specific forms of intervention. For the sake of clarity in public policy and predictability for business managers, it is helpful for agencies with shared responsibilities to converge on superior analytical techniques and to adopt procedures that minimize compliance costs.

The third consideration is that collaboration among agencies may achieve results that initiative by a single body cannot attain. For example, cooperation among

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<sup>208</sup> Bernstein, 7/29 DC Tr. at 56-57.

<sup>209</sup> Breul, 7/30 DC Tr. at 41-42. *See also* ANNE MARIE SLAUGHTER, A NEW WORLD ORDER 173-76 (2004) (discussing networks and competition policy); Fox, NY Tr. at 107 (same).

<sup>210</sup> Breul, 7/30 DC Tr. at 41-42; *see also* Bernstein, 7/29 DC Tr. at 56-57 (“I think it is probably implicit that it is absolutely essential for the Commission to have, I think, ongoing consultations with state agencies, with Congressional committees, staff and so forth, and with consumer groups and industry groups as well.”).

government bodies, particularly in matters of international commerce, may be essential to address phenomena that cross the boundaries of authority imposed on any single agency. Information sharing and common planning also may enable government bodies to pool resources and undertake more ambitious efforts to detect and prosecute improper conduct, or to diagnose the causes of apparent shortfalls in economic performance. Effective cooperation can be a major source of improved productivity among regulatory authorities and may be a necessary means for such bodies to meet the demands they face today amid intense pressure to achieve more with the same amount of resources.

This chapter examines how the agency can work with all of these actors, as well as what steps the FTC may undertake to improve and enhance relationships that can build and maintain support for the FTC's mission, leverage the agency's resources by enlisting others to advance the Commission's mission, and draw on others to help the Commission detect competition and consumer protection problems and conduct its own investigations.

### **A. Relationship with Congress**

As an independent agency created by Congress, the FTC has an important relationship with Congress as an institution and with individual members of Congress. Primarily through its Office of Congressional Relations, the FTC works closely with congressional committees and subcommittees, individual members, and their staffs, responding to inquiries regarding competition and consumer protection matters, testifying before congressional panels on FTC policies and programs, preparing reports for Congress, and providing congressional staff with the FTC's free consumer publications for distribution to their constituents.

A number of panelists stressed the importance of the FTC managing carefully its relationship with Congress. One way to envision the FTC's work is that its activities involve either accumulating political capital or spending political capital. In choosing new programs, the agency must be attentive to the balance of its political capital account. An agency that chronically runs major deficits is likely headed for trouble.

Panelist Jerry Ellig explained that the success of the FTC lies in maintaining strong congressional relationships, which can be forged through the FTC explaining to members of Congress that the success of the FTC's mission is good politics for the members.<sup>211</sup> Anna Davis, the former Director of the FTC's Office of Congressional Relations, agreed with Ellig regarding the need to inform members of Congress that FTC success is their success. Davis noted that one of the challenges the FTC faces is educating congressional stakeholders on the value to consumers of the agency's competition mission. Fundamental consumer protection concepts – such as stopping deception and fraud – are straightforward and their value to constituents is more obvious.<sup>212</sup> As Davis noted, however, the ways in which consumers benefit from competition in the marketplace is not always readily apparent:

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<sup>211</sup> Ellig, 7/30 DC Tr. at 37-38 (“I think . . . being able to focus on really important outcomes and demonstrate them does end up being good politically.”).

<sup>212</sup> Davis, 7/29 DC Tr. at 175-76.

One of the favorite calls I ever took when I was in the Congressional Relations Office was a [congressional] staff person called up and said, I heard from a constituent and he is very upset about gas prices. And I said, yes, ma'am, I know there is a lot of that going around. And she said, well, he is complaining because he has to drive around all over the place, all of the gas stations in his city have different prices and he has to drive around to find the lowest. Can't you make them all the same? So, it was sort of hard to know how to answer that and sound respectful. But that is a piece of it . . . .<sup>213</sup>

Davis also explained that nurturing congressional relationships also requires managing staff turnover. Her office took active steps to establish and maintain regular communication with congressional offices to mitigate the possible adverse effects of disruptions arising from staff and congressional turnover.<sup>214</sup> As an example of the need to maintain ongoing relationships with Congress, Davis pointed to the efforts her office made on the U.S. SAFE WEB Act, which involved many years of work with several congressional staffs to get the bill passed.<sup>215</sup>

The maintenance of good relationships with key legislators and committees can be complicated by the dynamic nature of the political process. Changes in aggregate congressional preferences over time may mean that the legislators who currently review and critique the Commission's projects are not the legislators who encouraged the FTC to pursue the projects in the first place.<sup>216</sup> Past experience suggests the need for the Commission to carefully monitor adjustments in legislative preferences and to test the agency's assumptions about the degree of congressional support for specific initiatives or programs.

## **B. Relationships with Other Federal Agencies**

Most of the FTC's dealings with other federal agencies – like most of the Commission's dealings with state and international agencies – fall into two broad categories: policy matters and enforcement cooperation.

Due to the wide breadth of the FTC's activities and overlapping jurisdiction in certain substantive areas of the law, the FTC has numerous policy and enforcement relationships with other federal government entities, including the Department of Justice, the Department of Commerce, the Department of State, the federal banking regulators,

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 197-98.

<sup>215</sup> *Id.*

<sup>216</sup> *See Kovacic, Oversight, supra* note 13, at 623-27.

the Consumer Product Safety Commission, the Federal Communications Commission, the Securities and Exchange Commission, and the U.S. Postal Inspection Service.

Referring to the importance of relationships with other national agencies, a panelist at the Ottawa roundtable stated:

[Another relevant criterion] is the effectiveness of the relationships between the antitrust authority or authorities and other government authorities, especially those in overlapping sectors, be it telecom, transportation, energy and so on. It is critically important, in my view, looking at not just our jurisdictions, Canada and the United States, but evolving jurisdictions – and China is but one that you will know quite well – to try to avoid unnecessary duplication and decisions that may be at odds, in whole or in part, [and] different processes and uncertainties that result from parallel government bodies looking at similar conduct or the same transaction. Ameliorating those differences and uncertainties is a sign of great success that an authority should recognize. It is very important to investors and business communities and stakeholders at large.<sup>217</sup>

Through its advocacy program, the FTC advises other federal agencies across a wide array of areas, such as food labeling, lending practices, and energy regulation.<sup>218</sup> FTC staff also frequently consults informally with other federal agency staff. Through these formal and informal consultations, the FTC has been able not only to coordinate efforts with these agencies but also to influence their work – and secure assistance in the FTC’s work – in ways that benefit consumers and competition.<sup>219</sup>

Relations with other federal agencies are important to the FTC’s consumer protection mission because of the overlapping jurisdiction that exists in certain areas (for example, the shared jurisdiction over consumer credit with the federal banking agencies) and the statutory law enforcement relationships in others (for example, the FTC’s

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<sup>217</sup> Goldman, Ottawa Tr. at 11-12.

<sup>218</sup> See, e.g., FTC Staff Comments before the Food and Drug Administration in the Matter of Draft Guidance for Industry and FDA Staff: Whole Grains Label Statement (Apr. 18, 2006), available at <http://www.ftc.gov/os/2006/04/v060014FTCStaffCommentstotheFDAReDocketNo2006-0066.pdf> (involving food labeling); FTC Staff Comments before the Board of Governors of the Federal Reserve System in the Matter of Request for Comments on Truth in Lending, Proposed Rule (Apr. 8, 2008), available at <http://www.ftc.gov/os/2008/04/V080008frb.pdf> (involving disclosure requirements in lending agreements); FTC Comment before the U.S. Federal Energy Regulatory Commission Regarding Wholesale Competition in Regions with Organized Electric Markets (Apr. 17, 2008), available at <http://www.ftc.gov/be/v070014b.pdf> (involving wholesale electric power markets).

<sup>219</sup> See, e.g., U.S. FOOD & DRUG ADMIN., CALORIES COUNT: REPORT OF THE WORKING GROUP ON OBESITY (2004), available at <http://www.cfsan.fda.gov/~dms/owg-toc.html> (relying on FTC advocacy and guidance on advertising practices and issues affecting obesity).

dependence on the Justice Department to pursue civil penalty cases). The relationship between the FTC and the Food and Drug Administration (“FDA”) is an example of a relationship that is critical for both entities, as well as for each entity’s stakeholders. Both the FDA and FTC are committed to protecting consumer welfare and promoting competition in the food and drug industries. The agencies thus have a longstanding agreement whereby they coordinate their efforts with respect to the food and drug markets.<sup>220</sup>

A recent example of effective coordination with another federal regulatory agency was the initiation of parallel actions by the FTC and the Federal Deposit Insurance Corporation (“FDIC”) against a company charged with deceptive credit card marketing targeted to consumers in the subprime lending market.<sup>221</sup> The two agencies worked together closely, sharing information during their investigations and each using its respective authority to address the consumer protection law violations uncovered. Both agencies challenged the practices of the primary credit card marketer (which contested the jurisdiction of both agencies). In addition, each agency also challenged the conduct of related entities subject to its particular jurisdiction – banks that issued the credit cards were charged by the FDIC and a debt collection subsidiary of the credit card marketer was charged by the FTC. The two agencies coordinated their separate legal proceedings and ultimate settlements of the cases.

The FTC’s Criminal Liaison Unit is another important aspect of the agency’s coordination with other government authorities. The program was created in 2003 to spur an increase in consumer fraud prosecutions through more systematic coordination between the FTC and criminal law enforcement authorities. The FTC’s CLU reviews current investigations and recent FTC litigation to select those cases that involve clearly criminal behavior, provides the relevant information to criminal investigators and prosecutors, and coordinates joint investigations and prosecutions. Since the creation of the CLU, prosecutors have indicted 281 FTC defendants, their associates, or others investigated by the FTC for consumer fraud. To date, 191 of these defendants have pled guilty or been convicted. Of the 150 defendants who have been sentenced, 38 have received prison sentences of more than seven years. Moreover, in Fiscal Year 2008, six FTC defendants have received sentences of more than 20 years.

Participants in the international consultations at the OECD Committee on Consumer Policy emphasized that collaborative relationships with other governmental agencies are critical to developing sound consumer protection policies. Many of the OECD member countries coordinate consumer policy initiatives across their domestic government ministries and agencies. For example, Finland, Japan, and Korea have intergovernmental working groups that consult on consumer policy issues and develop

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<sup>220</sup> See Working Agreement Between Federal Trade Commission and Food and Drug Administration, 4 Trade Reg. Rep. (CCH) ¶ 9850.01 (June 9, 1954).

<sup>221</sup> See FTC Press Release, FTC Sues Subprime Credit Card Marketing Company and Debt Collector for Deceptive Credit Card Marketing (June 10, 2008), available at <http://www.ftc.gov/opa/2008/06/compucredit.shtm>.

multiyear programs.<sup>222</sup> Other participants from foreign consumer protection agencies emphasized the importance of coordination among agencies that have jurisdiction over consumer-related matters *from the consumer's point of view* – after all, to a consumer, “government is government is government.”<sup>223</sup> Participants in the international consultations in Mexico City expressed interest in having the FTC serve as an intermediary with respect to other U.S. federal agencies (including banking agencies, the Federal Aviation Administration, and the FDA) due to the existence of multiple agencies in the United States that deal with consumer protection issues.<sup>224</sup> These types of issues in the international arena point to the importance of strong relationships with other consumer-related regulators and law enforcement agencies within the United States.

In the competition area, the FTC's most central interagency relationship on the federal level is with the Antitrust Division of the Department of Justice. The FTC and DOJ have significant overlapping jurisdiction with respect to antitrust enforcement and policy. For example, the agencies share antitrust jurisdiction over most mergers and business conduct.<sup>225</sup> Given these overlaps, the two agencies have developed premerger and enforcement clearance and communication procedures to avoid duplicative enforcement in competition matters.<sup>226</sup>

The history of the relationship between the two agencies has been marked by both agreement and times at which the agencies differed on competition policy. As a recent

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<sup>222</sup> Consultation with Agency Officials Attending OECD Committee on Consumer Policy Meeting, Oct. 22, 2008.

<sup>223</sup> *Id.*

<sup>224</sup> Consultation with Members Attending Iberoamerican Forum of Latin American Consumer Protection Agencies, Oct. 8, 2008.

<sup>225</sup> The FTC Act is as broad as that of the combined Sherman, Clayton, and Robinson-Patman Acts. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 647 (6th ed. 2007) (collecting cases). However, certain entities, such as depository institutions and common carriers, as well as the business of insurance, are wholly or partly exempt from FTC jurisdiction. *See* 15 U.S.C. § 45(a)(2). In addition, only the DOJ is vested with jurisdiction over criminal violations of the Sherman Act. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL II-3-11 (4th ed. 2008), available at <http://www.usdoj.gov/atr/public/divisionmanual/index.htm> (explaining the scope of the DOJ's criminal antitrust jurisdiction).

<sup>226</sup> Although the most extensive attempt to improve the process was abandoned in the face of congressional reaction, *see* Timothy Muris, *Comments on the FTC-DOJ Merger Clearance Process Before the Antitrust Modernization Commission*, at 13-19 (Nov. 3, 2005) [hereinafter Muris, AMC Comments], available at [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Muris\\_Statement.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Muris_Statement.pdf) (describing criticism both agencies received about the agreement and the reasons for its ceasing after only 11 weeks), this process has been the subject of ongoing discussion and revision, as the two agencies work together toward improving comity while retaining their individual authority within their respective jurisdictions. *See* Michael Denger, Caswell O. Hobbs, Janet L. McDavid & Sylvia H. Walbot, *60 Minutes with the Honorable Janet D. Steiger, Chairman, Federal Trade Commission*, 63 ANTITRUST L.J. 277, 293 (1994) (noting the modifications made to the then 45-year-old liaison agreement between the FTC and DOJ Antitrust Division regarding which agency would conduct certain investigations). Annually, the agencies jointly report the results of their premerger enforcement efforts. *See, e.g.,* FTC & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2007 (2008), available at <http://www.ftc.gov/os/2008/11/hsrreportfy2007.pdf>.

example of the former, the FTC and DOJ jointly conducted a workshop, drafted a report, and pursued enforcement actions in the real estate brokerage area.<sup>227</sup> Similarly, the two agencies conducted hearings and issued a joint report relating to conduct in the health care industry.<sup>228</sup> Other examples of the agencies seeking to identify common ground in overlapping enforcement areas include the creation of joint guidelines, such as those addressing horizontal mergers, collaborations among competitors, and the licensing of intellectual property.<sup>229</sup> These reports and guidelines were all prepared jointly by the FTC and DOJ and reflect symmetrical thinking with respect to the best enforcement policies and practices in these antitrust subject areas.

There also have been areas of disagreement, which have not only become sources of tension between the agencies, but also have created some uncertainty among other agency stakeholders. For example, FTC/DOJ discord arose in 2006, when the U.S. Solicitor General, with the assistance of the Antitrust Division, advocated in an amicus curiae brief that the Supreme Court deny the FTC's petition for certiorari in the *FTC v. Schering-Plough* matter.<sup>230</sup> More recently, in 2008, after working jointly for several months in conducting workshops, the two agencies could not reach agreement on a report relating to Sherman Act Section 2 enforcement. DOJ independently released a report,<sup>231</sup> which the FTC did not join.<sup>232</sup>

The international consultations focused on the FTC's relationship with the DOJ, and there was consensus that the different approaches (or perceived differences in approaches) by the FTC and DOJ significantly reduced the ability of the U.S. agencies, individually or together, to be influential in the international arena.<sup>233</sup> Regarding the

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<sup>227</sup> See FTC & U.S. DEP'T OF JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (2007), available at <http://www.ftc.gov/reports/realestate/V050015.pdf> (discussing the workshop and competition-related issues pertaining to the real estate brokerage industry).

<sup>228</sup> See FTC & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004) [hereinafter DOSE OF COMPETITION], available at <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>.

<sup>229</sup> These and other joint FTC/DOJ guidelines are discussed in more detail below in Chapter VI.B.5.

<sup>230</sup> See Brief for the United States as Amicus Curiae at 1, *FTC v. Schering-Plough Corp.*, No. 05-273 (2006), available at <http://www.usdoj.gov/atr/cases/f216300/216358.pdf> (arguing that the FTC's petition for certiorari should be denied because "the only important but unsettled issues of federal law that are raised by the petition are not well presented in this case").

<sup>231</sup> U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

<sup>232</sup> See Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>; Statement of Federal Trade Commission Chairman William E. Kovacic (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf>.

<sup>233</sup> See, e.g., Bloom, *London Tr.* at 166 ("There is an impression internationally that the two agencies are not necessarily on the same page when it comes to mergers and unilateral conduct. Now there is some strength in having different arguments and debating different sides of an issue, but if you are seeking to have a leadership position, that can become quite confusing. So this point is in relation to consistency. These are difficult issues but inconsistency does reduce your ability, I think, to be a powerful leader.").

Section 2 report, for example, while a few observers praised the willingness of the agencies to air differences of opinion, the vast majority viewed the divisiveness as damaging the efforts of the U.S. antitrust agencies to exercise international leadership.<sup>234</sup>

For those within the ambit of both the FTC's and DOJ's enforcement jurisdictions, comity and consistency of views between the agencies is important because it provides certainty for consumers and market participants.<sup>235</sup> Also, it can allow the agencies to operate more efficiently.<sup>236</sup> Thus, as the FTC works to improve its performance, it should consider how to improve its relationship with the DOJ to enhance the clarity, transparency, and consistency of antitrust enforcement.<sup>237</sup>

### C. Relationships with State Agencies

As with federal agencies, the FTC engages with state enforcers and other state institutions to address overlapping issues in competition and consumer protection enforcement, as well as policy matters.

On broad policy matters, the FTC often advises state legislatures and agencies through advocacy filings.<sup>238</sup> Additionally, the Commission sometimes participates in or helps organize meetings with the National Association of Attorneys General ("NAAG") to address issues of policy. The first of a series of annual meetings, for example, was held on September 21, 2006, when the FTC joined with NAAG to sponsor a workshop,

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Andreas Reindl also emphasized this point, saying, "if the two agencies cannot agree . . . [t]his undermines the leadership role of the agencies," and further suggesting that other agencies do a better job of minimizing the appearance of differences. Reindl, NY Tr. at 116-17.

<sup>234</sup> See, e.g., Gyselen, Brussels Tr. at 113; Vickers, London Tr. at 15; Valentine, London Tr. at 88.

<sup>235</sup> See, e.g., ABA TRANSITION REPORT, *supra* note 11, at 42-43 (discussing how interagency disagreements exacerbate already difficult issues related to antitrust enforcement).

<sup>236</sup> See Muris, AMC Comments, *supra* note 226, at 11-12 (recounting that after the 2003 clearance agreement was reached, Muris received a memo from Robert Jones, the FTC's Clearance Officer, who wrote, "At this moment, for the first time in my tenure as Clearance Officer, perhaps for the first time in the modern clearance era, there are no pending clearance requests. None, nada, zip. World peace will undoubtedly follow.").

<sup>237</sup> See, e.g., ABA TRANSITION REPORT, *supra* note 11, at 6, 42-43 (advocating that the two agencies reach accords on enforcement clearance issues and consistency on enforcement policies).

<sup>238</sup> See, e.g., FTC Staff Comment before the Massachusetts Department of Public Health Concerning Proposed Regulation of Limited-Service Clinics (Sept. 27, 2007), *available at* <http://www.ftc.gov/os/2007/10/v070015massclinic.pdf> (advising against the imposition of rules that would prohibit limited-service clinics from advertising, among other things, certain pricing information); Letter from FTC Staff to the Rules Committee of the Superior Court for the State of Connecticut (May 17, 2007), *available at* <http://www.ftc.gov/be/V070006.pdf> (advising against the imposition of rules that may restrict competition between attorneys and nonattorneys for services that do not necessarily require the skill or knowledge of a lawyer); Letter from FTC Staff to the Office of Court Administration, Supreme Court of New York (Sept. 14, 2006), *available at* <http://www.ftc.gov/os/2006/09/V060020-image.pdf> (advocating that the Supreme Court of New York adopt attorney advertising rules that would prohibit deceptive and misleading advertising without unnecessarily restricting truthful advertising from which consumers may benefit). See also *infra* Chapter VI.B.3.

attended by more than 50 representatives of state attorney general offices, on key issues in the petroleum industry.

On the enforcement side, comity with state antitrust and consumer protection agencies has become increasingly important given state involvement in many federal enforcement actions. Former Chairman Robert Pitofsky described his experience in this area as follows:

Building on relations with the state attorneys general that Janet Steiger had strengthened as Chairman, we recruited partners for dozens of sweeps targeting such frauds as bogus scholarship referral services, phony prize promotions, worthless diet aids, business opportunity scams, so called “credit repair” services, scams targeting small businesses, and work-at-home schemes.<sup>239</sup>

Offering a state enforcer viewpoint, Rebecca Fisher of the Texas Attorney General’s office stated that in her experience the FTC has placed significant emphasis on developing these relationships to the benefit of the states and the FTC.<sup>240</sup> Fisher explained that, although communication between the federal and state agencies was weak 20 years ago, she now has good communication with the FTC, which helps in her state’s enforcement work.<sup>241</sup>

Other roundtable participants stated that the FTC has worked to build relationships across boundaries with other enforcement agencies – a natural role for a federal consumer protection agency.<sup>242</sup> One panelist stated that although the states and the FTC are to a large degree doctrinally consistent in their enforcement approaches, in his view, the biggest problem is that antitrust enforcement at the state level has become more interesting to the attorneys general themselves, which means that decisions about enforcement are made at a “political” level rather than an antitrust staff level.<sup>243</sup> This can make coordination on substantive law more difficult.

Today, the FTC often conducts investigations jointly with state attorneys general because both have an interest in the particular merger or conduct at issue. One panelist

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<sup>239</sup> *Conversation with Muris and Pitofsky*, *supra* note 27, at 793. *See also* Luehr, Chicago Tr. at 61 (addressing the importance of law enforcement sweeps: “And you only get that kind of bang for the buck both in terms of business education and consumer education if you involve yourself in coordinated actions and realize that those coordinated actions provide you with a teachable moment.”).

<sup>240</sup> Fisher, 7/29 DC Tr. at 193-94 (“When I started 20 years ago, I know that the FTC and the states did not work together and that was one of the first things I was told when I came to the office. I think we have an excellent ongoing relationship now, but we have worked hard to get it. . . . [W]e have put into place some very important communication devices, and I think that always helps the relationships.”).

<sup>241</sup> *Id.*

<sup>242</sup> *See, e.g.*, Muris, 7/29 DC Tr. at 26.

<sup>243</sup> Langer, Boston Tr. at 72.

endorsed the benefits of such joint investigations on the ground that state AGs are uniquely positioned to recover money on behalf of injured consumers.<sup>244</sup> Such joint investigations may give rise to two possible sources of conflict, however. First, the FTC and the state AGs may disagree on the substantive law and economic analysis that may apply to the merger or conduct. Second, the existence of multiple enforcers may result in procedural conflicts or differences that raise the costs for the parties as well as the agencies.<sup>245</sup> There are ways to minimize conflict, however. One panelist, a senior attorney in the Illinois AG's office, explained that although FTC attorneys involved in joint investigations are not always experienced in working with states, the FTC usually makes strong efforts to have someone with experience on such investigations help coordinate the matter.<sup>246</sup>

Some commentators have stated that more should be done to develop FTC-state relationships. The ABA Transition Report described the present state of these relationships in competition enforcement as one that "generally works well."<sup>247</sup> However, the ABA also called for the FTC, DOJ, and the states to place greater emphasis on coordinating competition and consumer protection enforcement to avoid redundancy and inconsistent enforcement.<sup>248</sup> The ABA recommended that the agencies make it a greater priority to establish formal coordination protocols and to resolve differences in operational procedures, particularly related to merger review.<sup>249</sup>

Fisher explained that there are opportunities for the agency to work with state AGs in consumer and business education and advocated that the FTC take the lead in this area in the future.<sup>250</sup> The Commission has in fact done so, working both with NAAG as well as individual states.<sup>251</sup> A New York AG official suggested that potential areas for future collaboration between the FTC and the states include green marketing, alcohol

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<sup>244</sup> Harrop, Chicago Tr. at 185.

<sup>245</sup> See, e.g., *id.* at 183-84.

<sup>246</sup> *Id.* at 182, 184.

<sup>247</sup> ABA TRANSITION REPORT, *supra* note 11, at 56-57.

<sup>248</sup> *Id.* ("States are independent enforcers of federal and state antitrust laws. In the context of merger review, this overlap in jurisdiction creates the potential for simultaneous investigations of a transaction and differing and/or inconsistent enforcement outcomes at both the state and federal levels. . . . The federal agencies use the [FTC/DOJ Horizontal Merger] Guidelines. The State AGs, on the other hand, use the National Association of Attorneys General Horizontal Merger Guidelines. There are substantive differences between the two guidelines, particularly in the areas of market definition, timely entry, and the role of efficiencies. The agencies and the State AGs should work to resolve these differences to the extent possible.").

<sup>249</sup> *Id.*

<sup>250</sup> Fisher, 7/29 DC Tr. at 203.

<sup>251</sup> For example, the Commission has worked on consumer and business education with individual states that are involved in the FTC's enforcement sweeps and task forces. Among notable and recent examples is the telemarketing sweep of May 2008, where the Commission provided materials on telemarketing fraud for its state partners. See *infra* Chapter VI.B.8.

marketing, and scrutiny of the relief obtained in private consumer class actions.<sup>252</sup> Former BCP Assistant Director Paul Luehr maintained that there are also new areas in which the FTC sometimes should allow the states to “move out in front” and bring the first cases; the FTC could then follow the state actions with a federal injunction to ensure that there is “a kind of federal bar set across the country.”<sup>253</sup>

William Brauch of the Iowa AG’s office suggested that the BCP division directors make greater efforts to coordinate with AGs’ staff in particular substantive areas.<sup>254</sup> Brauch also discussed how, with respect to specific enforcement actions and general policy themes, there is a desire to have state agencies brought into the mix earlier, especially when these matters involve overlapping parties.<sup>255</sup> In this vein, former BCP Deputy Director Teresa Schwartz also suggested that FTC staff receive training and broader exposure to other law enforcement agencies, particularly in the area of criminal law.<sup>256</sup> Fisher also noted that the states have a liaison at the FTC on competition-related matters, which has been useful for coordination and planning, and suggested that a designated liaison for the states on consumer protection matters may be useful.<sup>257</sup>

Disagreements between government bodies will inevitably arise,<sup>258</sup> but the Commission’s relations with state agencies, like its relations with federal and foreign agencies, provide a basis to develop better competition and consumer protection policies and to advance enforcement through specific cases.

#### **D. Relationships with Foreign Enforcement Agencies**

The FTC has dealt with cross-border commerce for over 90 years; it had an Export Trade Division in 1918.<sup>259</sup> In recent years, though, building and maintaining relations with foreign authorities has become an increasingly critical element of the FTC’s programs, including its enforcement program. In addition to bilateral relations with foreign counterparts, the Commission has developed and expanded multilateral relations through such organizations as the OECD, the International Competition Network (“ICN”), the International Consumer Protection and Enforcement Network, the United Nations Conference on Trade and Development, and regional organizations such as the Asia-Pacific Economic Cooperation. This work has been coordinated through international shops devoted to competition and consumer protection, previously located

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<sup>252</sup> Feigenbaum, NY Tr. at 153, 155-56, 202-03.

<sup>253</sup> Luehr, Chicago Tr. at 41.

<sup>254</sup> Brauch, Chicago Tr. at 78.

<sup>255</sup> *Id.*

<sup>256</sup> T. Schwartz, Chicago Tr. at 83.

<sup>257</sup> Fisher, 7/29 DC Tr. at 194-95.

<sup>258</sup> Perhaps the starkest divergences between the FTC and states arise in cases involving state regulatory bodies that are restraining competition, but may be protected by the state action doctrine.

<sup>259</sup> *See* FTC, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1918, at 37 (1918), available at <http://www.ftc.gov/os/annualreports/ar1918.pdf>.

in the Bureaus of Competition and Consumer Protection and the General Counsel's Office, and, since 2007, consolidated in the Office of International Affairs.<sup>260</sup>

Among other functions, the former Export Trade Division monitored competition-related developments in other countries and responded to complaints alleging misconduct by domestic firms doing business overseas.<sup>261</sup> Today, the Commission engages foreign counterparts on policy and enforcement matters. As the recent ABA Transition Report noted, "The importance of international cooperation between antitrust agencies in ensuring the effective and coherent enforcement of antitrust laws around the world has never been greater or more complex to achieve."<sup>262</sup> The Commission's strong personal relationships with foreign counterparts facilitate international cooperation efforts,<sup>263</sup> which are important because, as one roundtable participant noted, contact at a personal level is "a factor that should not be underestimated in how the whole international cooperation process works."<sup>264</sup>

Given the importance of competition as an organizing principle for economies, and given such developments as the spread of competition-based regimes around the world, the growth of international fraud in the era of the Internet, and the increasing transmission in legitimate international commerce of sensitive data for business purposes, creating international questions of privacy and data security, the Commission's engagement with foreign governments on policy matters serves to inform the policy of other nations. By describing how the U.S. agencies approach various issues, the FTC hopes to provide useful information for other nations to consider as they make their own choices regarding market-based or regulation-based approaches to policy questions.

In addition, given the importance of the exchange of ideas and strategies, these interactions with foreign counterparts can inform an agency's domestic agenda and practices. Consultation participants articulated a belief that agencies become better at

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<sup>260</sup> See *supra* note 108.

<sup>261</sup> Among other things, the Export Trade Division monitored foreign developments and investigated foreign complaints against American merchants, reporting 50 such complaints in its 1921 annual report. FTC, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1921, at 63-64 (1921), available at <http://www.ftc.gov/os/annualreports/ar1921.pdf>.

<sup>262</sup> ABA TRANSITION REPORT, *supra* note 11, at 16. Indeed, in June 2008, OECD member countries at the ministerial meeting in Seoul on the future of the Internet economy recognized the importance of international engagement and cooperation and agreed to "[i]ncrease cross-border co-operation of governments and enforcement authorities in the areas of improving cyber-security, combating spam, as well as protecting privacy, consumers and minors." OECD, THE SEOUL DECLARATION FOR THE FUTURE OF THE INTERNET ECONOMY 9 (2008), available at <http://www.oecd.org/dataoecd/49/28/40839436.pdf>.

<sup>263</sup> Bourgeois, Brussels Tr. at 95-96. The management of the Canadian Competition Bureau emphasized the importance of this point, given the close relationship between the United States and Canada that affects both the competition and consumer protection missions. Consultation with Canadian Competition Bureau, Sept. 17, 2008.

<sup>264</sup> Brandenberger, Brussels Tr. at 91.

what they are doing by participating internationally.<sup>265</sup> Close relationships often encourage both the import and export of best practices.<sup>266</sup>

Many of the overseas consultations highlighted the need for agency leadership to have “empathy” or “emotional intelligence.”<sup>267</sup> Jorge Padilla, for example, explained this capacity as being able to articulate a message in a way that overcomes the audience’s confirmation bias,<sup>268</sup> Rachel Brandenburger described it as knowing when to lead and when to step back and encourage initiatives behind the scenes, stepping on and off the gas.<sup>269</sup> There was general consensus that when the leadership of the agency has high emotional intelligence, is personally, directly, and visibly involved, and is willing to deal with international peers one-on-one, it contributes substantially to the effectiveness of an agency’s international efforts.

Beyond matters of broad policy, many important FTC cases involve foreign parties, foreign-located evidence or assets, or parallel review with other agencies. Thus, effective cooperation with agencies outside the United States is a necessity. Mergers and business conduct frequently have adverse effects on competition and consumers in more than one jurisdiction. Cooperation among the affected jurisdictions avoids conflicts in enforcement and leads to effective coordination of measures to eliminate such effects.<sup>270</sup> In the competition area, enforcement cooperation between the FTC and foreign agencies has occurred most frequently in merger cases;<sup>271</sup> while less frequent, there have been significant instances of case cooperation in conduct (for example, monopolization) matters as well. In the consumer protection area, the agency has cooperated with foreign

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<sup>265</sup> See Bourgeois, Brussels Tr. at 94. Many other participants suggested that agencies, including the FTC, must focus resources on imports as well as exports, taking note of better ideas and practices from the rest of the world. See, e.g., Aitman, London Tr. at 140; Whish, London Tr. at 147; Fox, NY Tr. at 99; Consultation with Israeli Antitrust Authority, Aug. 19, 2008. In addition, roundtable panelists suggested international ties across agencies in the research area might be useful to produce new knowledge and to spread knowledge about the research results that already exist, but are not well disseminated. See, e.g., Sanderson, Ottawa Tr. at 62-64.

<sup>266</sup> Temple Lang, Brussels Tr. at 120. See also ABA TRANSITION REPORT, *supra* note 11, at 16 (“A key objective of international cooperation between antitrust agencies is to achieve convergence as far as possible (taking into account differences that might exist in each jurisdiction), in rules and standards of review and remedies in order to facilitate the conduct of business in the marketplace.”).

<sup>267</sup> See also SLAUGHTER, *supra* note 209, at 4 (“In a world in which their ability to use hard power is often limited, governments must be able to exploit the uses of soft power: the power of persuasion and information.”).

<sup>268</sup> Padilla, Brussels Tr. at 108-09.

<sup>269</sup> Brandenberger, Brussels Tr. at 95. See also Bourgeois, Brussels Tr. at 125; Koponen, Brussels Tr. at 126.

<sup>270</sup> See *supra* Chapter III.C for a more detailed discussion of the FTC’s efforts to gather information from foreign authorities.

<sup>271</sup> Recent matters in which the Commission cooperated with foreign authorities include the Google/DoubleClick and Owens Corning/St. Gobain merger cases. See FTC, THE FTC IN 2008: A FORCE FOR CONSUMERS AND COMPETITION 59-60 (2008), available at <http://www.ftc.gov/os/2008/03/ChairmansReport2008.pdf>.

authorities on a variety of cases involving cross-border issues, including consumer fraud. One area in particular – telemarketing fraud – has resulted in considerable cooperation between the FTC and Canadian authorities.<sup>272</sup> International cooperation also has emerged as a critical tool for investigations involving spam, spyware, and other online threats.<sup>273</sup> The FTC has cooperated with foreign counterparts on a number of matters implicating consumer privacy and data security issues and continues to develop its relationships with foreign authorities to enhance cooperation in such cross-border matters.<sup>274</sup>

As indicated above, the level and quality of interaction is determined in part by the rapport agency heads and staff have with their counterparts. Building relationships that facilitate cooperation and exchange, however, can be complex. As John Fingleton, Chief Executive of the United Kingdom’s Office of Fair Trading, explained, “The benefits [of relationships with foreign counterparts] are so diffuse, because they arise in a case here, a case there[.] [T]hey turn out to be enormously valuable, but in actual fact it is very difficult ex ante to identify that.”<sup>275</sup> Moreover, these relationships require significant investment. Fingleton continued, “[A] lot of the work that goes on is not just about best practice and importing that, but actually having that infrastructure [of agency relationships]. You need more lattices than the bare essentials to deal with the fact that people change, and the number 2s and the number 3s need to know each other because they will be the number 1s in many instances later. So you do need to overinvest I think in [the] capacity for that, and that is a difficult thing to justify.”<sup>276</sup>

Another important way in which the Commission works with foreign colleagues is by providing technical assistance to both younger and more mature agencies. Technical assistance projects and programs can allow an agency to improve its relationships with foreign counterparts and provide a significant opportunity to engage in

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<sup>272</sup> The FTC is a participant in six mass-marketing fraud enforcement partnerships with other federal, state, provincial, and local law enforcement agencies from the United States and Canada. One recent example of effective cooperation among U.S. and Canadian authorities involved 180 law enforcement actions brought by authorities in both countries, including the FTC, which targeted deceptive telemarketing practices. See FTC Press Release, FTC Announces “Operation Tele-PHONEY,” Agency’s Largest Telemarketing Sweep (May 20, 2008), available at <http://ftc.gov/opa/2008/05/telephoney.shtm>.

<sup>273</sup> One example is the FTC’s recent lawsuit against an international spam e-mail network, which involved cooperation from law enforcement authorities in Australia and New Zealand. See FTC Press Release, FTC Shuts Down, Freezes Assets of Vast International Spam E-Mail Network (Oct. 14, 2008), available at <http://www.ftc.gov/opa/2008/10/herbalkings.shtm>.

<sup>274</sup> For example, in 2007, through an OECD Recommendation, the FTC and its foreign partners called for strengthening cooperation among privacy regulators and law enforcement authorities to promote greater protection for personal information. See OECD, RECOMMENDATION ON CROSS-BORDER CO-OPERATION IN THE ENFORCEMENT OF LAWS PROTECTING PRIVACY (2007), available at <http://www.oecd.org/dataoecd/43/28/38770483.pdf>.

<sup>275</sup> Fingleton, London Tr. at 161.

<sup>276</sup> *Id.* at 158-59. Similar statements were made at the consultation with the Canadian Competition Bureau, stressing the importance of strong relationships at the case handler level. Consultation with Canadian Competition Bureau, Sept. 17, 2008.

the type of export and import activity that promotes cooperation and convergence. The FTC has provided technical assistance to countries in the developing world since the early 1990s, primarily using funds provided by the U.S. Agency for International Development and the U.S. Trade and Development Agency.<sup>277</sup> Much of the FTC's assistance has taken the form of placing long-term advisors with newly established competition and, in a few cases, consumer protection agencies. Through the use of long-term advisors, FTC staff have been able to build professional rapport and be present at "teachable moments" and provide assistance in the context of real cases. In other cases, FTC assistance has been in the form of workshops in which we have led officials through simulated investigations of competition cases typical of those encountered in developing countries or by sharing the FTC's experience in the application of market-based consumer protection law. In many cases, these seminars are coupled with side meetings that allow experts and recipients to interface and delve deeper into significant issues. The technical assistance program serves the agency's mission by promoting sound practice and policy with other agencies to improve multijurisdictional investigations and actions and forge better relations at the staff level.

The Commission also participates in exchanges in which staff from one agency spend several weeks or months at a counterpart agency, and the international consultations highlighted the value of such exchanges.<sup>278</sup> Staff exchanges were perceived as an extremely effective tool to share best practices, solidify bilateral relationships, and strengthen enforcement cooperation with foreign counterparts, as well as adding to an employee's knowledge base and skills.<sup>279</sup> Many foreign counterpart agencies use staff exchanges extensively as a way to promote staff development, and, as noted in Chapter IV.D, development of its own staff is another value of such exchanges to the Commission.

#### **E. Relationships with Consumers and Consumer Groups**

Consumers are, of course, one of the key constituencies for the FTC. How the agency relates to consumers – either directly or through various consumer and advocacy groups – is thus a significant factor in the agency's ultimate success. The agency's direct interactions with consumers are largely limited to receiving complaints from consumers and issuing educational materials for use by consumers. A significant means for relating to consumers is therefore through interactions with various consumer groups.

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<sup>277</sup> For Fiscal Year 2008, Congress appropriated additional funds to the FTC, with the recommendation, for the first time, that the agency consider funding technical assistance efforts with a portion of the funds. See 154 CONG. REC. H16054 (daily ed. Dec. 17, 2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H16054&dbname=2007\\_record](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H16054&dbname=2007_record).

<sup>278</sup> See, e.g., Bloom, London Tr. at 169; Sanderson, Ottawa Tr. at 55.

<sup>279</sup> See, e.g., Nagy, Paris Tr. at 44. The U.S. SAFE WEB Act enhanced the FTC's ability to host staff from foreign counterpart agencies. Pursuant to this new authority, the FTC established a formal International Fellows Program that allows staff from counterpart agencies to spend up to six months at the FTC, working with FTC staff on policy and enforcement matters, and for FTC staff to spend time at counterpart agencies. In 2007 and 2008, staff from Brazil, Canada, Hungary, Israel, Australia, and Turkey participated in the program, and the FTC sent a staff member to the United Kingdom.

FTC advocacy, policy, and education efforts (discussed in greater detail in Chapter VI) aid consumers directly and often aid nonprofit and other consumer groups advancing similar policies at local levels. Panelists offered various perspectives on consumer-focused information provided by the FTC. For example, Michael Kaiser of the National Cyber Security Alliance (“NCSA”) discussed how his organization benefits from the “constant flow of information from the FTC.”<sup>280</sup> Kaiser remarked how the FTC’s policy and advocacy efforts in the identity theft area have benefitted NCSA’s work with local enforcement agencies, particularly with communicating the serious consequences of identity theft, which is an issue some other enforcement agencies have been slower to address.<sup>281</sup> Beau Brendler of Consumers Union stated that his organization relies on the FTC for information it communicates to its members and clients, be it through websites, blogs, or other publications.<sup>282</sup> Panelist Peter Swire, in his written comments, also echoed this sentiment and advocated that the FTC continue its efforts of preemptive advocacy to prevent harm to consumers – especially in technology areas – before they occur.<sup>283</sup>

Kevin DeMarrais, a newspaper journalist, explained how his column – which relies in part on information from the FTC – is not necessarily meant to solve consumer problems, but rather to point consumers in the direction of information sources that can help solve their problems.<sup>284</sup> He sees himself as a conduit both for reporting consumer problems and communicating the FTC message to consumers.<sup>285</sup> DeMarrais explained that his readers follow consumer protection issues, but do not necessarily rely on one particular source for information or particularly care what the source of the information is. This makes it incumbent upon the FTC to communicate its message through as many outlets as possible.<sup>286</sup> Kaiser added that many consumers seem to access the FTC only after something bad happens to them (such as identity theft), and therefore for the agency to help consumers stay in front of issues, the FTC needs to keep the advocacy groups and media meaningfully informed.<sup>287</sup>

Panelists also stressed the importance of ensuring that the means by which the FTC provides its information remain up-to-date. Brendler explained that websites already are becoming passé, and that to remain relevant the agency must not only be in front of issues, but be present in the media on which people rely for information.<sup>288</sup> This

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<sup>280</sup> Kaiser, NY Tr. at 225.

<sup>281</sup> *Id.* at 226.

<sup>282</sup> Brendler, NY Tr. at 229-30.

<sup>283</sup> *See* Written Submission of Peter P. Swire, Oct. 29, 2008, at 5.

<sup>284</sup> DeMarrais, NY Tr. at 228.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 234-35.

<sup>287</sup> Kaiser, NY Tr. at 235.

<sup>288</sup> Brendler, NY Tr. at 236-38.

means understanding the different gradations or demographics of consumers, the information media on which they rely, and preparing the FTC message such that it can be understood in the appropriate format for the targeted consumer.<sup>289</sup> Brendler suggested that the agency consider social networking because consumers – especially younger consumers – obtain their information from newer and nontraditional sources.<sup>290</sup> Panelist Jerry Cerasale suggested that the FTC continue to evaluate ways it can use up-to-date technology, such as Twitter-type services, to monitor current topics directly from consumers.<sup>291</sup> Other panelists stated that the FTC is effective in getting its message out, but cautioned that it needs to be cognizant of the ever-changing media landscape, as it is easy to fall behind.<sup>292</sup>

In addition to getting its message out to consumers, the FTC must consider its (two-way) interactions with consumers and consumer groups. Panelist Ari Schwartz opined that the FTC’s outreach to consumer groups has been mixed, at best, and should be improved.<sup>293</sup> Schwartz went on to discuss how greater transparency of agency decision making and the inclusion of interested groups in the process would help in making FTC actions more effective.<sup>294</sup>

Despite the time and costs such collaboration may require, former BCP Deputy Director Lee Peeler suggested that successful enforcement results have significant impacts, including profound long-term effects on relationships with nongovernment stakeholders who may not even be involved in a particular enforcement action.<sup>295</sup> Similarly, DeMarrais cited instances in which he has seen FTC and private litigation over certain issues that expand the exposure of a given consumer problem, and thereby give the issue greater prominence, staying power, and ultimately more meaning to consumers.<sup>296</sup>

Cerasale discussed how consumers can be incorporated directly into FTC policy and information gathering through consumer surveys, which not only gather information regarding potential fraud and other deceptive practices, but also assess how FTC messages are received.<sup>297</sup> Doing so in collaboration with consumer groups enables the agency to focus on issues that are priorities to consumers.

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 236-37.

<sup>291</sup> Cerasale, NY Tr. at 212-13.

<sup>292</sup> *See* DeMarrais, NY Tr. at 247; Brenner, NY Tr. at 247-49.

<sup>293</sup> A. Schwartz, 7/29 DC Tr. at 204-06 (“I think that it was better back in the Pitofsky FTC. . . . I think it was much clearer when Jodie Bernstein ran the Consumer Protection Bureau about what is legal, what is illegal and what we want in the future. I think that that led to a greater push for industry to do the right thing in the self-regulatory space. And then that faded when that push went away.”).

<sup>294</sup> *Id.* at 219-20.

<sup>295</sup> Peeler, 7/30 DC Tr. at 141-42.

<sup>296</sup> DeMarrais, NY Tr. at 242.

<sup>297</sup> Cerasale, NY Tr. at 213-15.

Panelists suggested that having liaisons within the agency to facilitate communication with consumer groups and industry would be a sensible step toward building relationships with these constituencies.<sup>298</sup> For example, Ari Schwartz endorsed the notion of having an “outreach coordinator” to facilitate communications between consumer groups and the relevant staff at the FTC.<sup>299</sup>

The overseas consultations yielded discussions of diverse methods for eliciting back-and-forth communication and collaboration with consumer groups and other nongovernment organizations. For example, three times a year, the Australian Competition and Consumer Commission convenes a meeting of its Consumer Consultative Committee, which includes representatives from 14 consumer organizations. The ACCC rotates the location city and pays participants a “sitting fee” as well as transportation costs.<sup>300</sup> Similarly, the Netherlands consumer agency, the Consumentenautoriteit, holds stakeholder consultations twice a year, with consumer groups and others, to consult on its annual agenda.<sup>301</sup> Japan uses an innovative approach, employing approximately 1,100 official “registered consumer monitors” who are hired to assist the Japan Fair Trade Commission (“JFTC”) in understanding public opinion on consumer protection issues.<sup>302</sup>

In many countries, the government provides financial and other types of support for consumer NGOs, which play an important role in shaping consumer policy, helping consumers solve problems, and bringing consumer-related legal actions. For example, the U.K. provides substantial financial support to Consumer Focus (a new NGO that merged the former National Consumers Council, Energywatch, and Postalwatch), which plays an active role in studying and formulating consumer policy, as well as providing advocacy on specific issues such as open markets, consumer services, and disadvantaged consumers.<sup>303</sup> New Zealand’s Ministry of Consumer Affairs organizes and provides

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<sup>298</sup> Brendler, NY Tr. at 257.

<sup>299</sup> A. Schwartz, 7/29 DC Tr. at 200.

<sup>300</sup> Consultation with ACCC, Oct. 2, 2008. The meetings are private but the transcripts are publicly available. The consumer members are expected to provide input on issues and processes affecting consumers that fall within the scope of the ACCC’s administration of the Trade Practices Act; emerging issues or market developments that may be of concern to particular groups of consumers; and information dissemination strategies and appropriate external networks available to enhance communication with community and consumer groups and consumers. *See* ACCC, Consumer Consultative Committee, <http://www.accc.gov.au/content/index.phtml/itemId/800732>.

<sup>301</sup> Consultation with Agency Officials Attending OECD Committee on Consumer Policy Meeting, Oct. 22, 2008.

<sup>302</sup> Consultation with Japan Fair Trade Commission, Sept. 19, 2008.

<sup>303</sup> Consultations with U.K. Department for Business Enterprise and Regulatory Reform and Various U.K. Consumer Organizations, Sept. 12, 2008. Additional information regarding Consumer Focus is available at <http://www.consumerfocus.org.uk>. Ofcom, the U.K.’s communications regulator, like some other U.K. sectoral regulators, has an independent consumer panel that is funded through compulsory levies on service providers. The role of the Ofcom panel is to help “inform Ofcom’s decision-making by raising specific issues of consumer interest. These include issues affecting rural consumers, older people, people with

training for a network of consumer representatives and also sources nominations for consumer representatives to join the boards of other government agencies and committees to promote consumer input into policymaking.<sup>304</sup> It also has published guidelines on consulting consumers.<sup>305</sup> This level of involvement on both policy and enforcement issues among government entities and consumer groups is a common model in Europe as well as Asia and Latin America.

## F. Relationships with Market Participants

Industry stakeholders rely on the FTC for information and guidance on competition and consumer protection enforcement, regulation, and policy. In turn, the agency can benefit in its work from the insight, expertise, and cooperation of industry groups. Panelists discussed whether the FTC offers useful guidance, whether it gathers industry views and suggestions, and whether it coordinates effectively with industry, where appropriate.

Brussels panelist Luc Gyselen reported that DG Comp devotes significant resources to maintaining relationships to conduct industry-sector research and learn more about industry and anticipate potential competition-related issues.<sup>306</sup> Along these lines, OFT Chairman Philip Collins suggested that the FTC consider having a liaison with industries with which it has significant interaction.<sup>307</sup> For example, the ACCC maintains in its organization business liaisons drawn from outside the agency. The ACCC organizes these liaisons into six specialized consultative committees: consumers, small business, franchising, health, infrastructure, and energy. The committees provide feedback on the ACCC's performance and other issues within each relevant industry, as well as a means for the ACCC to communicate with the industries regarding its enforcement decisions.<sup>308</sup>

One key means of coordinating with marketplace participants is through public workshops and hearings. These events have proved beneficial in collecting relevant industry information, establishing enforcement priorities, and influencing policy development.<sup>309</sup> Workshops in a wide range of areas – from spam e-mail to childhood

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disabilities and those who are on low incomes or otherwise disadvantaged.” The Ofcom panel has a budget to conduct research in these areas. *See* Ofcom, Communications Consumer Panel, [http://www.ofcom.org.uk/about/csg/consumer\\_panel/role/](http://www.ofcom.org.uk/about/csg/consumer_panel/role/).

<sup>304</sup> Consultation with Agency Officials Attending OECD Committee on Consumer Policy Meeting, Oct. 22, 2008. *See also* New Zealand Ministry of Consumer Affairs, Consumer Representation, <http://www.consumeraffairs.govt.nz/aboutus/consumer-rep/CRindex.html>.

<sup>305</sup> NEW ZEALAND MINISTRY OF CONSUMER AFFAIRS, CONSUMER REPRESENTATION: CONSULTING CONSUMERS (2004), available at <http://www.consumeraffairs.govt.nz/aboutus/consumer-rep/Consulting.pdf>.

<sup>306</sup> Gyselen, Brussels Tr. at 17.

<sup>307</sup> Consultation with OFT, Sept. 11, 2008.

<sup>308</sup> Consultation with ACCC, Oct. 2, 2008.

<sup>309</sup> *See* Peeler, 7/30 DC Tr. at 168; MacLeod, 7/30 DC Tr. at 169.

obesity – not only provided means to coordinate with industry and consumer stakeholders, but also allowed the FTC to take a leadership role in resolving concerns affecting its constituents.<sup>310</sup>

Industry stakeholders can provide useful information to the FTC regarding marketplace conduct and developments. Former BCP Director William MacLeod emphasized the use of workshops as an effective way to collaborate with industry and learn “how the marketplace is working in different areas . . . [to] get a much better idea of where [the agency’s] resources ought to be.”<sup>311</sup> Further, as panelist Jack Calfee pointed out, competitors are usually quick to provide information about a counterpart’s fraud or deception.<sup>312</sup> MacLeod also discussed an instance in which the gathering of marketplace information led to further enforcement action. In the early 1980s, the FTC launched a survey to assess Truth in Lending compliance among automobile dealers.<sup>313</sup> The agency subsequently brought several enforcement actions, after which the agency learned that by simply surveying and warning businesses the level of compliance in the industry had improved substantially.<sup>314</sup>

As discussed in more detail below in Chapter VI.B.7, another important facet of the FTC’s relationship with market participants is the promotion of appropriate industry self-regulation, which can serve as an important complement to the agency’s law enforcement efforts. As Lee Peeler discussed, relative to law enforcement, industry self-regulation can provide businesses with much quicker issue resolution mechanisms.<sup>315</sup> In the advertising area, Peeler described the FTC’s encouragement and support for self-regulation as essential to the success of the system now in place.<sup>316</sup>

### **G. Relationship with Academia**

Finally, several panelists stressed the importance of reaching out to the academic community to spur research in areas of interest to the FTC, which can expand the agency’s research resources as well as benefit the participating academics.<sup>317</sup> North America has the world’s premier academic infrastructure in disciplines related to competition law, consumer protection, and economics. Tapping this remarkable asset more effectively – and availing the agency of the extraordinary collection of superb

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<sup>310</sup> MacLeod, 7/30 DC Tr. at 169.

<sup>311</sup> *Id.* at 143.

<sup>312</sup> Calfee, 7/30 DC Tr. at 165-66.

<sup>313</sup> MacLeod, 7/30 DC Tr. at 143.

<sup>314</sup> *Id.*

<sup>315</sup> Peeler, 7/30 DC Tr. at 137-38.

<sup>316</sup> *Id.* at 166.

<sup>317</sup> *See, e.g.*, Crandall, 7/30 DC Tr. at 202, 271; Salinger, 7/29 DC Tr. at 135-37; Nevo and Carlton, Chicago Tr. at 277-87; Elhauge, Boston Tr. at 46-47; Rose, Boston Tr. at 128-29, 134-37; Waddams, London Tr. at 68.

academic departments and research centers around the world – through formal and informal cooperation can be a source of great advantage to the FTC.

Although outside academics have been useful in certain agency initiatives,<sup>318</sup> panelists expressed some concern that FTC issues are either little known or underappreciated by the larger academic community. Former BE Director Michael Salinger explained:

One of the challenges is, particularly if you are looking to the economics profession to do a lot of this analysis, because a lot of it has to be done by economists in my view, the academic wing of the profession is not all that interested in the policy issues that the agency faces.<sup>319</sup>

Thus, research and work that is valuable for purposes of the agency's enforcement efforts may not be appreciated by all members of the academic research community.<sup>320</sup>

By having its own research agenda, the FTC can potentially stir interest in these topics by those in the academy. Salinger explained that he saw great value in bringing in members of the academic community for various events, such as workshops, as a way to prompt academics both to notify their students and colleagues about FTC issues and to inspire research into areas in which the FTC is interested.<sup>321</sup> In that vein, one purpose of the recently established FTC/Northwestern University Annual Microeconomics Conference is to introduce more academics to the FTC and its areas of interest.<sup>322</sup> The partnership with Northwestern is a prototype for what could prove to be deeper integration between the FTC and other academic research centers.

New York roundtable panelist Eleanor Fox suggested that the FTC, as have other competition agencies, build its relationship with academics to improve analysis of FTC research and policy positions and to recruit talented lawyers and economists.<sup>323</sup> Former General Counsel Debra Valentine suggested a greater role of independent academic experts in developing and analyzing FTC policy.<sup>324</sup> Panelist Nancy Rose observed that often the attraction for academics to engage with any government agency is to obtain

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<sup>318</sup> See *Conversation with Muris and Pitofsky*, *supra* note 27, at 784 (Muris discussing consultations with academic experts relative to FTC privacy initiatives).

<sup>319</sup> Salinger, 7/29 DC Tr. at 137.

<sup>320</sup> Wright and Picker (Chicago Tr. at 175) noted that certain types of research, such as merger retrospectives, will not get the author academic tenure, even if they are valuable to policymakers.

<sup>321</sup> Salinger, 7/29 DC Tr. at 164.

<sup>322</sup> See FTC Workshop, First Annual Federal Trade Commission & Northwestern University Microeconomics Conference (Nov. 2008), <http://www.ftc.gov/be/workshops/microeconomics/index.shtm>.

<sup>323</sup> Fox, NY Tr. at 113.

<sup>324</sup> Valentine, London Tr. at 76.

access to interesting data.<sup>325</sup> She suggested that in the academic climate today, industrial organization research has been focused on complex econometric modeling that may not be ideally targeted to the types of issues facing the agency:

You have to find some way to convince scholars that there are significant rewards to them as researchers from undertaking this kind of analysis when it's not the style that's perhaps perceived to generate the greatest rewards just within academia. I think we're very driven in academics by the availability of data and particularly new data that hasn't been analyzed and so something like . . . [the] suggestion that we have some idea about where cases were in the ranking or what determined which cases were over the threshold that would let us then look at how moving that line affects outcomes might be something that would move researchers in that direction. And it might be even institutionalizing something like a periodic conference that really focuses on questions like this. Sometimes that convinces somebody to jump-start a research project because they know they'll be able to present their work at a hearing, maybe influence policy and have an outlet for it.<sup>326</sup>

Former OPP Director Susan DeSanti, echoing many of the sentiments expressed by other panelists relative to FTC relationships with academia, suggested that to build relationships with the academic community the agency needs to designate an office to maintain these relationships.<sup>327</sup> She explained that traditional academics are often communicators of ideas, and the agency should be thinking about building the relationships from that perspective as well.<sup>328</sup> She suggested that these relationships need constant monitoring and maintenance, but when they work they can be extremely valuable.<sup>329</sup>

In some jurisdictions, the consumer protection agency has its own agenda but commissions research from outside academics as well as internal specialists. For example, DG SANCO, the European Commission's Directorate for Health and Consumer Affairs, often puts out formal tenders for studies in consumer-related areas that are then conducted by academic researchers. The U.K.'s OFT also has commissioned academics

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<sup>325</sup> Rose, Boston Tr. at 106.

<sup>326</sup> *Id.* at 107-08. The FTC does have authority to share information with academics who serve as consultants to the Commission. *See* Winerman, Paris Tr. at 120 (noting that the FTC has litigated and established its ability to turn confidential materials over to academics who sign consulting agreements and agree to submit their research to agency review prior to publication); *Aluminum Co. of Am. v. FTC*, 589 F. Supp. 169, 173-75 (S.D.N.Y. 1984).

<sup>327</sup> DeSanti, 7/29 DC Tr. at 165.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

to prepare studies on certain topics. This approach, of course, may be limited by an agency's resources to fund such research.

The Japan Fair Trade Commission has concluded that to pursue competition policy effectively requires an active interaction between the academic community and practitioners, such as the JFTC. To promote this interaction the JFTC established in 2003 the Competition Policy Research Center ("CPRC") within its General Secretariat to provide a functional and continuous collaborative platform between outside researchers and the JFTC staff and to strengthen basic ideas on implementing Japan's Antimonopoly Act. The CPRC promotes interaction on four fronts – between academic knowledge and policy implementation, between academics and policymakers, between law study and economics, and between Japanese researchers and those overseas. Since 2003, the CPRC has produced many international symposia, open seminars, reports, and discussion papers.<sup>330</sup>

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The FTC has important relationships with several types of outside entities. These relationships impact the agency's performance in various ways, and each requires a slightly different approach by the FTC to maintain the relationship. Some relationships – such as those with Congress, consumers, and industry – involve interaction and communication regarding how the agency pursues its mission. Some relationships – such as those with domestic and international agencies – involve coordination in law enforcement efforts. Some relationships – such as those with domestic and international agencies and the academy – involve efforts by the FTC to research, develop, and promote sound competition and consumer protection policy. In any case, the FTC can benefit from, and improve its effectiveness with, input from each of these stakeholders.

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<sup>330</sup> Additional information regarding the CPRC is available at <http://www.jftc.go.jp/cprc/english/index.html>.

## V. Agency Leadership, Strategic Planning, and Policy R&D

The three related topics discussed in this chapter – agency leadership, strategic planning, and policy research and development – each have a direct and significant impact on the successful functioning of the FTC. Effective leadership at the top of the agency sets the tone for how the staff executes the agency’s mission. Strategic planning is instrumental to effective deployment of the agency’s resources. Policy research and development, including the setting of a research agenda, allows the agency to make well-informed enforcement and policy decisions.

In recent decades, the Commission has used a variety of techniques to set plans for the use of its resources. These include budgeting and policy planning exercises at the Commission level, bureau-level strategic planning, and the extensive use of public consultations – workshops, seminars, hearings, and town hall proceedings – to identify promising subjects for the agency’s attention. The agency has related what it learns to a framework that identifies the full range of agency policy instruments and seeks to devise integrated programs that employ all of these capabilities. For example, the agency’s anti-fraud program in this decade has featured coordinated enhancements of the FTC’s consumer education program to encourage precaution taking, a bolstering of cooperation with government prosecutors to encourage criminal prosecution of serious wrongdoers, improvements in the agency’s Consumer Sentinel database to speed the detection of fraud, and the use of the U.S. SAFE WEB authority to ensure effective treatment of cross-border misconduct. In this and other areas, the agency consciously has attempted to develop integrated strategies to increase the likelihood that misconduct will be detected promptly, that misdeeds will be prosecuted effectively, that strong sanctions will be imposed, and that potential victims can increase their capacity to avoid injury.

### A. Leadership

“Leadership can make all the difference in determining whether [an agency will] accomplish [its] goals and objectives.”<sup>331</sup> Effective leadership involves not only understanding the agency mission, structure, and the interests of key stakeholders, but also communicating the mission and priorities to agency staff to motivate them to carry out the mission of the agency effectively over time.<sup>332</sup> Agency leadership also affects employee morale, which often dictates agency success. This section discusses areas for consideration in evaluating how leadership impacts the agency.

Former Chairman Timothy Muris explained that the FTC “either runs with a strong chairman or it does not run.”<sup>333</sup> Commentators have emphasized the important leadership role of the Chairman in determining key appointments and setting the

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<sup>331</sup> ABRAHMSON ET AL., *supra* note 19, at 2.

<sup>332</sup> *Id.*

<sup>333</sup> Muris, 7/29 DC Tr. at 48.

enforcement and research agendas for the agency.<sup>334</sup> In an interview after his tenure was complete, former Chairman Robert Pitofsky explained how leadership by his predecessor, Janet Steiger, included not only standing up to powerful interests in the private sector, but also a willingness to listen to original and innovative proposals that challenged conventional thinking.<sup>335</sup> Pitofsky also noted that every Commissioner must bring to bear his or her own experience, focus, and insights, which for him involved an appreciation of past agency failures and an understanding of how to get things done through the agency's structure.<sup>336</sup> Muris likewise explained that the Chairman must work with the other Commissioners to achieve the mission, which means balancing different and sometimes competing interests.<sup>337</sup> This can mean making a priority of interests promoted by other Commissioners to persuade them to follow the Chairman's vision for the FTC.<sup>338</sup>

Commentators also have identified continuity as another important factor in effective leadership, both at home and internationally. Pitofsky posited that competition leadership is stronger in general due to a decrease in variation from administration to administration because policymakers have arrived at a "fairly widespread agreement on premises," particularly in antitrust enforcement.<sup>339</sup> OFT Chief Executive John Fingleton described continuity of leadership as important to maintaining strength and credibility among competition agencies. He recounted a comment by Mario Monti, the former Commissioner for Competition at the European Commission, that the American system has a revolving door and that the leadership transitions much too quickly.<sup>340</sup> As change of personnel is inevitable, leaders' commitment to relative continuity in policy may ease some of the concerns over personnel changes and make agency leadership more effective.<sup>341</sup> However, when those new to enforcement emerge in leadership positions, there can be delays in getting things done until people are known and trusted in the

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<sup>334</sup> See KATZMANN, *supra* note 76, at 87-97 (discussing the Chairman's role in setting the agency agenda, influencing agency leaders, and directing the budget process).

<sup>335</sup> Pitofsky Interviews, *supra* note 156, at 121.

<sup>336</sup> *Conversation with Muris and Pitofsky*, *supra* note 27, at 849-50.

<sup>337</sup> Muris, 7/29 DC Tr. at 49; *see also* Pitofsky Interviews, *supra* note 156, at 121-24 (discussing the importance of the Chairman working with other Commissioners to both advance the agency's agenda and enable Commissioners to advance their own interests); KATZMANN, *supra* note 76, at 107-08 (explaining the difficulty of setting clear policy with a collegial body of Commissioners, and that policy is often enhanced when Commissioners value input from different perspectives).

<sup>338</sup> *See* Muris, 7/29 DC Tr. at 49-50; Pitofsky Interviews, *supra* note 156, at 122-23.

<sup>339</sup> Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583, 586 (2002).

<sup>340</sup> Fingleton, London Tr. at 157-58.

<sup>341</sup> Muris echoed this theme in his remarks when taking over as Chairman of the FTC. Praising Robert Pitofsky as one of the most effective Chairmen in the history of the FTC, Muris explained that, except for some changes at the margins, the FTC under his leadership would emphasize continuity: "There will be no sea change in enforcement." Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, Speech before the American Bar Association Antitrust Section Annual Meeting (Aug. 7, 2001), available at <http://www.ftc.gov/speeches/muris/murisaba.shtm>.

competition community, which is a consequence any organization must face in transition.<sup>342</sup>

Complementing leadership at the top, some panelists suggested that the FTC is effective because staff, possessing both the expertise in competition and consumer protection law and the relative freedom to explore innovative ways to make progress in these areas, drive the agency toward stronger leadership. Former BCP Assistant Director Paul Luehr described this as a culture and management style that focuses on bottom-up integration of leadership.<sup>343</sup> Luehr said the culture of the FTC involves “taking good ideas from the staff level and letting those percolate to the top, especially with regard to the enforcement mission.”<sup>344</sup> Recognition of this bottom-up style of management was echoed by Teresa Schwartz, who described how former BCP Director Jodie Bernstein used her staff as a resource, not just to fulfill the mission as she directed them, but to identify ways to fulfill the mission based on their experience.<sup>345</sup> Schwartz explained that it took managerial leadership to listen to staff, value their input, and encourage them to generate ideas on how best to address problems.<sup>346</sup>

Effective leadership advances the agency’s mission and positively impacts agency morale. Greater continuity of leadership can strengthen the agency’s ability to perform its mission both in the shorter term and as senior leadership of the Commission changes across administrations.

## **B. Strategic Planning**

Strategic planning at a government agency involves more than just a determination of how insightfully to identify and understand problems that arise, but also a determination of how to pick the right tool or right collection of tools (or even the right sequencing of tools) to use to address such problems. In the case of the FTC, the agency must decide, for example, whether to issue guidelines, bring a case, create rules, or hold public consultations to address the various competition and consumer protection problems that it faces.<sup>347</sup>

This section addresses several issues regarding strategic planning and how the FTC goes, and should go, about doing it. First, what dictates the agency’s planning? Does it depend entirely on having wise Chairs, Commissioners, and bureau directors? That is, is the agency’s planning principally a function of who happens to inhabit these

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<sup>342</sup> The bureaus have made some efforts to maintain continuity in leadership. For example, the relatively recent addition of a Deputy Director in the Bureau of Competition, who is not a political appointment, has been a step that will likely ensure greater continuity in leadership within BC.

<sup>343</sup> Luehr, Chicago Tr. at 25.

<sup>344</sup> *Id.*

<sup>345</sup> T. Schwartz, Chicago Tr. at 29-30.

<sup>346</sup> *Id.*

<sup>347</sup> *See* Kovacic, 7/29 DC Tr. at 55.

positions at different times? Second, what is the proper scope of the agency's strategic planning? Should it involve bureau-by-bureau planning, or should it be an agency-wide exercise? Third, should the planning be centralized within the agency? For example, should there be a research panel or board within the agency to oversee such planning? Fourth, should there be specific procedures in place to develop strategy? For example, should the Bureau of Economics take the lead in identifying issues, with ad hoc groups within the bureaus gathering to address these issues and ultimately going to the Commission with proposals?<sup>348</sup> Finally, how does the agency ensure the proper implementation of its chosen strategies?

## 1. Importance and Goals of Strategic Planning

The consultations confirmed the importance of strategic planning to the success of this, or any other, agency. Former Chairman Muris explained that it is insufficient to have a core mission and to define it well; the agency needs a strategy to implement it. That strategy requires continual new thinking and innovation.<sup>349</sup> Jodie Bernstein echoed Muris' comments, explaining that continual planning and innovation are necessary, citing as examples of such planning and innovation the expansion of the agency's international efforts, the expansion of efforts targeting Spanish-speaking media, and the creation of the Criminal Liaison Unit.<sup>350</sup> Another panelist succinctly characterized strategic planning as "absolutely vital."<sup>351</sup>

In addition to innovation, roundtable panelists identified policy continuity as another important goal of strategic planning. Former General Counsel Debra Valentine framed the relevant inquiry as follows: "How can you keep an acute sense of the past and the evolving trends so that you can try to keep some strategies going through time, notwithstanding the inevitable impulse of the next gang to really want to leave their mark?" In other words, how does the agency "keep a thoughtful strategy that ties learnings and lessons of the past with sensitivity to trends of the future?"<sup>352</sup> Valentine observed that, although each agency chair will want to set his or her own strategic agenda, policy continuity will provide such chair with "buy-in with the public and the consumer."<sup>353</sup> John Fingleton explained that the governance structure of the OFT, which has a board composed of a majority of nonexecutives, provides "a certain type of

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<sup>348</sup> See *id.* at 28, 35-37.

<sup>349</sup> Muris, 7/29 DC Tr. at 20-21. See also Muris, *Principles*, *supra* note 17, at 168 ("Without a general strategy and a positive agenda, an agency becomes a passive observer, swept along by external developments and temporary exigencies. An institution that merely reacts to circumstances and does not work from a coherent philosophy will ultimately fail to achieve lasting success.").

<sup>350</sup> Bernstein, 7/29 DC Tr. at 26. See also T. Schwartz, Chicago Tr. at 35 (explaining that BCP picked the emerging Internet as one of its major focuses, with the result that BCP had a strategic plan, built around the high-tech, global marketplace hearings it had held in 1995, that governed the bureau's priorities over the next five or so years).

<sup>351</sup> Brauch, Chicago Tr. at 37.

<sup>352</sup> Valentine, London Tr. at 85.

<sup>353</sup> *Id.* at 89.

continuity,” as the board is responsible for setting long-term strategy for the agency, rather than making individual enforcement and policy decisions, which is left to OFT executives.<sup>354</sup>

The goal of policy continuity, however, does not imply inflexibility in strategic planning. Several panelists emphasized the importance of building flexibility into any strategic planning efforts. In discussing her efforts in the 1990s, Bernstein explained that her planning efforts “set out a roadmap so that I had a sense of where we were going. That didn’t mean that there was not flexibility built into the roadmap so that [when] things inevitably occur that are not anticipated . . . one would have the ability to deal with them.”<sup>355</sup> Another panelist explained that “[b]eing able to shift, being able to move and being able to adjust to market changes and what’s next” is enormously important.<sup>356</sup> An agency has to have “the agility to move around that may be a little uncomfortable, but gives [it] the ability to respond as the market and other conditions change.”<sup>357</sup> The Chairman of the U.K. Competition Commission, Peter Freeman, characterized the need for flexibility as follows: “[A]s the Duke of Wellington has said, ‘time spent on reconnaissance was seldom wasted.’ Also, I think he said words to the effect of ‘all plans collapse on first contact with the enemy.’ I think that neatly encapsulates the position certainly from our point of view.”<sup>358</sup> Strategic planning, Freeman continued, “cannot be too rigid and it cannot be too binding. [B]ut everything we do should take place . . . against a background of priorities and policy consciousness.”<sup>359</sup>

## 2. Strategic Planning at the FTC

The Commission’s strategic planning efforts include specific enforcement and policy agendas brought to the agency by Chairmen, Commissioners, and senior staff; the strategic planning done pursuant to the Government Performance and Results Act and various other reporting requirements; and senior staff retreats that the Commission has held for more than a decade. Other examples of strategic planning include “policy review sessions,” which were used in the 1970s and 1980s to permit the Commission members and the staff to discuss significant policy issues.<sup>360</sup> The Commission recently revived this custom in 2008 to discuss how the Commission might address various issues concerning the financial crisis. Former Commissioner Thomas Leary described how,

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<sup>354</sup> Fingleton, London Tr. at 86.

<sup>355</sup> Bernstein, 7/29 DC Tr. at 34-35.

<sup>356</sup> Breul, 7/30 DC Tr. at 31. The Canadian Competition Bureau, for example, maintains a core team, with as much as 25 percent of the agency’s resources available to it, to address unforeseen priorities that emerge during the three-year course of a planning cycle. Consultation with Canadian Competition Bureau, Sept. 17, 2008. Philip Lowe from DG Comp similarly suggested that flexible staff movement around the agency is an essential component to an effective agency. Consultation with DG Comp, Oct. 21, 2008.

<sup>357</sup> Breul, 7/30 DC Tr. at 31-32.

<sup>358</sup> Freeman, London Tr. at 80.

<sup>359</sup> *Id.* at 83-84.

<sup>360</sup> *See* Kovacic, 7/29 DC Tr. at 45-46.

during the early 2000s, the agency used to circulate background papers on advocacy issues, such as the state action doctrine, that the Commission anticipated addressing. This was not done in the context of specific cases; rather, it was “simply to see if we could agree among ourselves on what the Commission policy ought to be ultimately when these things arise.”<sup>361</sup>

Beyond these, perhaps the most intensive form of formal strategic planning at the FTC largely has taken place in the Bureau of Consumer Protection. The FTC consumer protection mission has a broad reach, protecting consumers in the myriad ways they interact with various kinds of businesses. These protections range from requiring that advertising claims have a reasonable basis of support to ensuring that consumers receive full disclosure of the terms of financial service transactions. To accomplish its mission most effectively, BCP targets issues and leverages resources through strategic planning.

Bureau-wide strategic planning began in the mid-1990s, and the process has become an integral part of how BCP operates. A strategic plan generally covers a 12- to 18-month period. It encompasses both BCP initiatives and matters that are not discretionary, such as reports or rulemaking proceedings mandated by Congress. Managers solicit ideas from staff members, who review complaint data, monitor advertising, survey market literature, and also obtain information from industry, consumer groups, and law enforcement partner agencies, among other stakeholders. Ideas also may be generated in connection with workshops or town hall meetings conducted by the Commission to explore emerging problems or areas of concern. Staff from the regional offices, as well as the seven divisions of BCP, are included in the planning process. Some projects cross program lines, requiring coordinated planning by staff from two or more BCP divisions. Managers of each division develop a plan, and all of the plans are reviewed by all division managers who provide feedback to each other.

Plans are then submitted to and ultimately approved or modified by the bureau. They become a basis for allocation of resources, including contracts, travel, and staff time, and are reviewed during quarterly meetings involving bureau and division managers. Plans are not inflexible, but can be revised, as needed, to respond to new issues or problems in the marketplace. Evaluation and assessment takes place at the end of the planning period, and managers are accountable for their progress in accomplishing plan goals.

Former Chairman Pitofsky recently described this BCP strategic planning as follows:

Jodie Bernstein instituted the strategic planning process at the outset of her term as BCP Director. She involved staff at all levels of the Bureau and regional offices, giving them an opportunity to think broadly about consumer protection issues and use their firsthand experience to propose new,

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<sup>361</sup> Leary, 7/29 DC Tr. at 38-39.

more effective ways of doing things. This inclusive process made the final plan a team effort and one that reflected the best thinking of our talented staff. The strategic plan's benefits were striking. Among them: the establishment of clear law enforcement priorities; the identification of the most pressing and the newly emerging consumer issues and the best approaches to tackling them; the ability to allocate resources to the most serious problems; and increased efficiency across the Bureau.<sup>362</sup>

Turning to strategic planning undertaken elsewhere in the agency, former BE Director David Scheffman observed that, even taking into account the resources that must be devoted to merger review, the agency has “tremendous latitude” in how to allocate its resources, making strategic planning essential.<sup>363</sup> Nonetheless, according to former BC Director Molly Boast, extensive strategic planning in BC during the late 1990s necessarily was a victim of the merger wave of that time and the resulting drain on bureau resources. Even when an agency is not faced with such a significant workload, Boast observed, strategic planning does “consume considerable resources”; it has to be balanced against other uses of agency resources. Nonetheless, ad hoc opportunities for strategic planning can be found in the potential cases that the agency confronts. Boast cited the example of the pharmaceutical patent settlement cases that first arose in the late 1990s as an opportunity for BC and the Commission to do an extensive analysis of a particular area of competition law and decide on a particular strategy – even if such strategy was not necessarily planned in advance.<sup>364</sup>

Recommendations for future FTC strategic planning offered by roundtable panelists involved both the level at which such planning should take place and the inputs necessary for such planning. Bernstein recommended that the FTC engage in agency-wide – not just bureau-by-bureau – strategic planning because it would “energize” both BCP and BC by letting each bureau see what the other's ideas are. This would address the concern Bernstein has with the Balkanization of the agency into bureaus or even divisions that do not communicate with each other.<sup>365</sup> Former BCP Deputy Director Teresa Schwartz echoed Bernstein's recommendation that strategic planning should take place not only at the bureau level, but agency-wide as well.<sup>366</sup>

Panelists identified both internal and external sources of information that are crucial to effective strategic planning. Bernstein explained that for her one of the functions that it served was “to open up the Bureau so that I knew what the best thinkers were thinking, what their experience was and how I could build upon that to construct a

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<sup>362</sup> *Conversation with Muris and Pitofsky, supra* note 27, at 789.

<sup>363</sup> Scheffman, NY Tr. at 20-21 (cautioning against being “driven by the inbox”).

<sup>364</sup> Boast, NY Tr. at 17-20.

<sup>365</sup> Bernstein, 7/29 DC Tr. at 43.

<sup>366</sup> T. Schwartz, Chicago Tr. at 90.

program that would make good sense . . . .”<sup>367</sup> Schwartz concurred as to the importance of drawing on the experience and knowledge of staff, which knows “what’s bubbling out there.”<sup>368</sup> Similarly, Nicholas Hill, Chief Executive of the Commerce Commission of New Zealand, explained: “[T]he process we are going through at the moment is very much a bottom up one where essentially I’ve outlined as a new chief executive what I think the challenge for the organization is at a high level, but essentially put it back on the staff to say, so how should we deal with this? At the end of the day, the Commission and [I] will make the calls. But it is very much about engaging them, engaging their minds and their passion in the organization.”<sup>369</sup>

Several panelists, including Bernstein and Schwartz, stressed the importance of also including outside entities – including state agencies, congressional staff, consumer groups, and industry – in the planning process in order to anticipate where the next controversy will be, get relevant information from key stakeholders, and gauge how much support the agency will have to take action in a given area.<sup>370</sup> Former BCP Assistant Director Paul Luehr argued that it is also crucial in doing strategic planning to look at relevant data and have that drive (at least in part) the agency’s agenda. For example, with the Consumer Sentinel database, the agency can hear from “thousands of consumers” about what cases to bring, making the agency’s mission “much more coherent.”<sup>371</sup>

### **3. Examples of Strategic Planning Efforts at Other Competition and Consumer Protection Agencies**

External consultations revealed several examples of strategic planning undertaken at other competition and consumer protection agencies. The U.K. Office of Fair Trading employs several methods in planning and implementing its overall strategy, and has a dedicated “strategy and planning team,” which is engaged in all parts of strategic planning development and implementation to help ensure consistency across the agency. The strategic planning process begins with the Chief Executive developing strategy and plans in consultation with stakeholders, followed by the OFT’s Board, which functions similarly to a board of a public company, providing guidance on longer-term policy and strategy decisions, rather than specific enforcement decisions, which are taken by the Executive. Each year, the Board approves an annual plan for the agency, providing a strategic steer and risk assessment that considers the agency as a whole (rather than at the

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<sup>367</sup> Bernstein, 7/29 DC Tr. at 34.

<sup>368</sup> T. Schwartz, Chicago Tr. at 33. *See also id.* at 30 (describing how during her tenure (middle to late 1990s), several innovations found their way up from staff to management, including the complaint center and the electronic collection and sharing with enforcement partners of the complaints in Consumer Sentinel, law enforcement sweeps, and the global, high-tech marketplace hearings).

<sup>369</sup> Hill, Paris Tr. at 108-09.

<sup>370</sup> *See* Bernstein, 7/29 DC Tr. at 56-57; T. Schwartz, Chicago Tr. at 33-34; Luehr, Chicago Tr. at 39; Hill, Paris Tr. at 107.

<sup>371</sup> Luehr, Chicago Tr. at 42.

level of an individual case or project).<sup>372</sup> The resulting priorities then strongly inform the decisions of division directors as they prepare annual program plans for their respective areas. When the division directors submit proposals for resources, the Executive Committee, a group including the Chief Executive and senior executives, assesses the overall portfolio of bids against the strategic priorities when deciding how to allocate resources.

Decisions to undertake new work are guided by four “prioritization principles,” which the OFT developed following consultation with external stakeholders, including: (1) impact, which includes considerations of the likely direct and indirect effects on consumer welfare, deterrence, and efficiencies; (2) strategic significance, which entails inquiries about whether the given matter fits within the OFT’s strategy or current portfolio and whether the OFT – or some other alternative, such as private enforcement or self-regulation – is best placed to act; (3) risk (*i.e.* the likelihood of a successful outcome); and (4) resources (*i.e.* the resource implications of pursuing a particular matter).<sup>373</sup> Although these principles are neither exhaustive nor applied mechanically, they create a common descriptive language to assess and compare agency priorities.<sup>374</sup>

Closely linked to the OFT’s prioritization principles is the agency’s so-called effective project delivery (“EPD”) framework. Developed in response to criticism regarding the length of OFT investigations, the agency applies the EPD framework to significant projects and cases, in effect, to plan backwards from the desired outcome to achieve OFT’s strategic goals. Key components of the framework include a clear definition of the project’s scope, deliverables, and deadlines; clarity in roles, responsibilities, and resource allocation; and the use of customized steering groups comprised of staff from across the agency to provide input on each project and to assess the fit of a particular project within the agency’s entire portfolio of matters. The first phase of the EPD process, which involves the development of a substantive theory of harm and an estimate of the impact of agency action, in particular, is influenced by the prioritization principles driving the agency’s overall strategy.<sup>375</sup>

The European Commission’s DG Comp uses an iterative, top-down—bottom-up planning process to prioritize its enforcement matters and allocate staff resources. As such, cases are often generated by staff or complainants. DG Comp applies several

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<sup>372</sup> However, the Board does review high-risk and major projects, providing advice regarding case-specific plans for such projects, including timing and milestone plans. The Board also recently initiated a process by which the various groups within OFT appear before the Board to report on their respective efforts and to discuss their plans, ongoing projects, and any problems that they are encountering. Although it has not been entirely systematic, this periodic review by the Board is reported to have been quite productive. Consultation with OFT, Sept. 11, 2008.

<sup>373</sup> U.K. OFFICE OF FAIR TRADING, OFT PRIORITISATION PRINCIPLES 8-10 (2008), *available at* [http://www.offt.gov.uk/shared\\_offt/about\\_offt/oft953.pdf](http://www.offt.gov.uk/shared_offt/about_offt/oft953.pdf).

<sup>374</sup> Consultation with OFT, Sept. 11, 2008.

<sup>375</sup> *Id.*

prioritization criteria – including consumer impact, precedential value, and deterrence – in evaluating prospective cases.<sup>376</sup>

One of the ways in which DG Comp attempts to implement its strategic planning is the use of a peer review system to foster intra-agency debate concerning a particular matter. A peer review consists of a discussion among the case team originally assigned to a matter, a “fresh set of eyes,” often including a case manager and a sectoral expert, and an independent scrutiny officer responsible for submission of a written report to senior officials. Although these reviews are highly resource-intensive, they allow DG Comp to engage staff in a meaningful way in implementing its long-term strategies.<sup>377</sup>

René Jansen, a board member of the Netherlands Competition Authority, described the annual strategic planning process that has been in place at his agency for a few years. The process begins with a broad policy framework – developed by the agency’s three-person executive board in consultation with the directors of the agency’s several offices – that addresses significant administrative and policy issues the NMa anticipates over the course of the coming year. The next step in the process involves consultations regarding this framework with external stakeholders, including politicians, industry, the bar, and academia. The final step of the process includes the development of a working plan – based on the broad policy framework – for use by the agency’s directors in the following year. The working plan provides the directors with specific targets in all areas of the NMa’s work, including enforcement and other policy efforts, as well as internal, administrative areas. Jansen expressed satisfaction with this planning process, but acknowledged that his agency is continually trying to improve it.<sup>378</sup>

The Canadian Competition Bureau recently has engaged in a process involving an environmental scan that feeds directly into its agenda setting. The Bureau reviews sector and marketplace developments to identify potential problems relevant to each of its branches. The Bureau’s senior management team analyzes the results of this scan and drafts a high-level agenda, which a wider management group then develops in greater detail. An operational plan is developed for each of the issues identified. The plan may employ a variety of tools, including law enforcement and consumer education, and always includes a strategy for measuring success. Finally, a process – managed by a steering committee – is in place to ensure that resources are matched to priorities and to identify and present to senior management significant issues in the marketplace that merit the Bureau’s attention. Staff is able to submit issues and ideas directly to the steering committee, thus providing bottom-up input into the Bureau’s prioritization practices. Similar to the situation at the FTC, this process is better developed for the Bureau’s Fair Business Practices Division (analogous to BCP at the FTC) than it is for its competition sections.<sup>379</sup>

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<sup>376</sup> Consultation with DG Comp, Oct. 21, 2008.

<sup>377</sup> *Id.*

<sup>378</sup> Jansen, Paris Tr. at 102-05.

<sup>379</sup> Consultation with Canadian Competition Bureau, Sept. 17, 2008.

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Any future evaluation of the FTC’s strategic planning efforts ought to consider the following issues. First, what should dictate the agency’s strategic planning? Should it be top-down planning through the budget process, bottom-up planning with issues originating with bureau management or at lower levels of the bureaus, or Chairman-driven planning? Should it be some combination of those means? Second, what is the proper scope of the agency’s planning efforts? Should strategic planning be done agency-wide, bureau-by-bureau, or at both levels? Third, should there be a centralized locus – for example, a review board – for the agency’s strategic planning? Fourth, should there be specific procedures or protocols in place to develop strategy? Finally, how does the agency ensure that it is appropriately implementing its strategies?

### **C. Policy Research and Development**

This section examines the important role of policy research and development at the FTC. An agency that intends to be thoughtful and to consider its policy actions seriously must have some ability to analyze the trade-offs inherent in any policy choice. That capability can be developed through, among other means, academic-style research, information gathering and report writing, and conferences and workshops that bring together elements from business, government, consumer representatives, and the bar to discuss issues related to FTC policy and law.

This section first defines the notion of policy R&D and then discusses the several goals served by engaging in policy R&D. This section also examines how the agency sets a research agenda, including the way in which policy R&D topics have been chosen in the past, how they are currently chosen, and how the process might be improved in the future. Finally, this section presents a set of specific suggestions for policy research and development provided in the course of external consultations.

#### **1. Defining Policy R&D**

Activities that reasonably could be called “policy R&D” take many different forms within the various organizations comprising the FTC. To academic economists, “research” sometimes means pursuing the answer to an author-initiated research question using state-of-the-art techniques in the hope of publishing the work in a scientific journal. That is, however, not the bulk of research at the FTC, or even the bulk of research in the FTC’s Bureau of Economics. The notion of policy R&D involves much more. Policy R&D includes answering policy-relevant questions posed by Congress or agency leaders, as well as addressing issues required by specific statutes. In addition, policy R&D includes workshops and conferences aimed at competition and consumer protection policy topics.

Some of the FTC’s policy R&D work is highly analytical in nature; some of it is a compilation of academic and policy literature; and some is more largely descriptive of

various informed opinions on policy-relevant questions or the functioning of particular markets.<sup>380</sup> Some research topics fall into a very specific FTC policy area or an active enforcement area – for example, the effects of a particular oil merger on prices. Other topics are related to underlying “academic” questions – for example, scale economies in some particular industry of interest to the FTC. Most FTC R&D efforts are narrowly related to the FTC’s competition and consumer protection missions, although a nontrivial portion of the agency’s work historically has been focused on policies of other government agencies that have had implications for competition policy, consumer protection policy, or consumer welfare.<sup>381</sup>

Given that the FTC is a law enforcement agency with antitrust and consumer protection responsibilities, it is easy to think about all nonenforcement activity as policy R&D, but clearly that would sweep in too much by including conferences or workshops that bring together industry participants to hear the agency’s view of the state of a particular area of the law, reports on the agency’s various activities to Congress, and a host of other activities that have little research content or that clearly are not aimed at analyzing new policies or variations in current policy. For example, some BCP workshops, reports, and presentations, such as the many “red flags” hearings, can be characterized as outreach to the business community and are not necessarily oriented toward specific policy alterations. Many enforcement-related workshops on debt collection and international fraud prevention, as well as annually issued reports on various law enforcement activities, are so directly connected to specific areas of enforcement that they are probably better thought of as enforcement or enforcement R&D, rather than policy R&D. However, almost all of these efforts have some R&D component in the sense that learning from the events might trigger some alteration in law enforcement policies. Thus, for all intents and purposes, a clear division between enforcement efforts and policy R&D does not exist at the FTC.

## **2. Goals Served by Policy R&D**

The FTC has a mandate to undertake certain forms of research based on Section 6 of the FTC Act and the historical report-writing activity of its predecessor entity, the Bureau of Corporations.<sup>382</sup> That mandate differentiates the FTC from most other antitrust or consumer protection agencies in the world in that it enables the agency to use compulsory process to gather data in a context other than law enforcement. From its

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<sup>380</sup> Former BE Director Michael Salinger argued that certain reports that mainly discuss the opinions of others, as is true of many FTC workshop reports, are not really research. Salinger, 7/29 DC Tr. at 139-40. That may be true in the narrow sense of the term research; such reports are policy R&D, however, in the sense that they are compiled with the intention of learning enough facts about a topic to alter policy in beneficial ways.

<sup>381</sup> For example, work on regulation topics involving communications, transportation industries, international trade restraints, and licensed professions were staples of FTC research programs in the late 1970s and 1980s. Several studies on the regulation of health claims for foods were undertaken in the 1990s and 2000s.

<sup>382</sup> See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

inception, the FTC carried on a general investigative function that complemented its law enforcement activities. The results of the investigations were compiled in reports that were intended to shed light on various questionable business practices of the day. That activity was the precursor of what is now thought of as research and policy R&D at the FTC. As explained below, apart from the primary purpose of answering specific research questions, the FTC, including its several components, undertakes research for a number of reasons.

**a. Support for Enforcement, Advocacy, and Other Agency Efforts**

Research and policy R&D is undertaken to improve agency decision making in specific areas, such as law enforcement, rulemaking, and competition and consumer protection advocacy. FTC research today is seldom done with an eye toward direct use in law enforcement activities. Some reports, however, have been generated in conjunction with antitrust-related activities or have led to follow-on legal activity. The use of empirical research work to support a complaint in the case of a consummated hospital merger is an example of the use of research in enforcement. Also, conceptual work by economists at the FTC has helped support the agency's merger enforcement efforts in recent merger litigations.<sup>383</sup> Research also has been done on the value of the Do Not Call list, when elements of that program were questioned.<sup>384</sup> Empirical policy work on health claims for foods has provided a firmer basis for FTC policy and for advocacy in the area of nutrition labeling. For example, several empirical studies done on food health claims during the 1990s and early 2000s provided the basis for FTC advocacy arguments that rigid regulatory bans on such claims are not likely to be in the best interest of consumers.<sup>385</sup> Two consumer research studies of the mortgage market in 2004 and 2007 were likewise important in providing the agency with insight into the problems that exist in the current federally required disclosures made to consumers about mortgage products and the terms and conditions of the mortgage debt they acquire.<sup>386</sup> Such studies provided support for several recent advocacy comments in the consumer credit arena.

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<sup>383</sup> See, e.g., Daniel P. O'Brien & Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 ANTITRUST L.J. 161 (2003) (cited in *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1048 (D.C. Cir. 2008) (Tatel, J., concurring)).

<sup>384</sup> See, e.g., Keith B. Anderson, *The Costs and Benefits of Do-Not-Call Regulations: A Comment on Beard and Abernethy's "Consumer Prices and the Federal Trade Commission's Do-Not-Call Program,"* 26 J. PUB. POL'Y & MKTG. 144 (2007).

<sup>385</sup> For a discussion of those studies and their role in informing food regulatory policy, see Luke Froeb, Daniel S. Hosken & Janis Pappalardo, *Economic Research at the FTC: Information, Retrospectives, and Retailing*, 25 REV. INDUS. ORG. 353 (2004).

<sup>386</sup> See FTC BUREAU OF ECONOMICS STAFF, JAMES M. LACKO & JANIS K. PAPPALARDO, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS (2007), available at <http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf>; FTC BUREAU OF ECONOMICS STAFF, JAMES M. LACKO & JANIS K. PAPPALARDO, THE EFFECT OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT (2004), available at <http://www.ftc.gov/os/2004/01/030123mortgagefullrpt.pdf>.

Further, to address the proliferation of spam email, the FTC compiled information about the problem and possible ways to address it and became a major participant in fashioning workable legislation.<sup>387</sup> Additionally, the FTC used policy R&D to complement its recent enforcement efforts to stop anticompetitive conduct designed to delay entry of generic drugs. This combined research and enforcement agenda also informed substantive changes to the Hatch-Waxman Act.<sup>388</sup> This type of policy R&D also is necessary to ensure that FTC actions keep abreast of relevant scholarly learning. For example, several panelists discussed the role that the research into advertising in the 1970s and 1980s played in informing the FTC's advertising enforcement.<sup>389</sup> This research also influenced courts and state policymakers on their approach to the regulation of advertising. Workshops and research also can demonstrate intellectual leadership. The FTC's workshops on green marketing and food advertising and obesity, for example, have helped to establish the Commission as an international leader in these areas.<sup>390</sup>

Policy R&D work also has been used as an adjunct to various self-regulatory efforts. Bringing information and facts to bear on various policy issues is often an effective means of moving policy debates forward. On occasion, firms are induced to alter their behavior in desirable ways if the evidence shows a real problem. On the other hand, if the evidence indicates that the purported problem is small or nonexistent, then resources can be redeployed to more pressing issues. For example, recent BCP projects addressing violence in various entertainment media,<sup>391</sup> the placement of alcohol advertising,<sup>392</sup> and food advertising aimed at children<sup>393</sup> were an important means of shining factual light on topics of current policy interest.

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<sup>387</sup> The referenced legislation is the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or CAN-SPAM Act, Pub. L. No. 108-187, 117 Stat. 2699 (codified at 15 U.S.C. §§ 7701-7713). The area of food marketing to children presents another example of where the FTC has conducted a workshop, held a follow-up forum, and conducted a major study of promotional expenditures and activities. The Commission's report, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation*, included not only a great deal of information not previously compiled and published, but also recommendations to advance the Commission's policy goal of promoting strong self-regulation by both the food and entertainment industries. See MacLeod, 7/30 DC Tr. at 169 (citing 2008 FOOD MARKETING REPORT, *supra* note 203).

<sup>388</sup> See *Conversation with Muris and Pitofsky*, *supra* note 27, at 776-78 (Muris noting how the 2002 generic drug study helped generate cases and reform of the Hatch-Waxman Act); see also Parker, 7/29 DC Tr. at 118 (noting that the patent settlement cases were a "good example where there was a policy and then some enforcement cases that put meat on the bones").

<sup>389</sup> See, e.g., MacLeod, 7/30 DC Tr. at 173-74.

<sup>390</sup> See MacLeod, 7/30 DC Tr. at 169; Peeler, 7/30 DC Tr. at 170.

<sup>391</sup> FTC, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES (2000) [hereinafter 2000 MEDIA VIOLENCE REPORT], available at <http://www.ftc.gov/reports/violence/vioreport.pdf>.

<sup>392</sup> 2008 ALCOHOL SELF-REGULATION REPORT, *supra* note 204.

<sup>393</sup> 2008 FOOD MARKETING REPORT, *supra* note 203.

## **b. Tool and Skill Development**

To operate effectively, the FTC requires a highly skilled staff, who are able to take on research tasks that are sometimes ill-defined and may require inventive approaches to problems. Research activities often allow the agency to develop ways to better analyze problems that can be used in antitrust or consumer policy settings. Doing such analysis in a law enforcement or litigation environment often is difficult or impossible; doing it in a research environment is thus necessary. For example, FTC economists have been doing research work on demand estimation that may pay off in the application of those techniques in competition cases, where demand estimation is occasionally a key element in market definition or in predicting the likely effects of a merger.<sup>394</sup> As another example, empirical research allows the agency to keep up with data-moving and econometric techniques that are becoming increasingly essential as enforcement of the antitrust and consumer protection laws becomes more data-intensive. The ability to handle large data sets and understand how to derive useful implications from that data are often the keys to making fact-based decisions in such cases. As confirmed by roundtable panelists, an in-house research capability is important to ensure that an agency can handle difficult issues that arise frequently in the cases that it pursues.<sup>395</sup>

## **c. Development of Industry Expertise**

Research topics often allow the agency to gain a better understanding of industries, including those, such as energy and health care, which feature prominently in the agency's law enforcement agenda. For example, the agency's gasoline and diesel price monitoring project allows the agency to track changes over time in price-cost margins and to notice anomalies in prices in various cities or regions.<sup>396</sup> Although checking for such anomalies is now routine, this effort initially was a policy R&D project. Policy R&D also has been in evidence at the FTC in the health care area for over 30 years. Recent examples include the 2003-2004 hearings that led to the report, *Improving Health Care: A Dose of Competition*,<sup>397</sup> as well as a 2006 BE workshop on the economics of the pharmaceutical industry.<sup>398</sup> These R&D efforts are intended to help the agency understand whether and how markets can be part of the solution to vexing health care policy questions.

Other R&D projects are designed to gain information about industries that the agency expects to be important in its future enforcement and policy efforts. For example,

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<sup>394</sup> See, e.g., Steven Tenn & John Yun, *Biases in Demand Analysis Due to Variation in Retail Distribution*, 26 INT'L J. INDUS. ORG. 984 (2008).

<sup>395</sup> See, e.g., Waddams, Valentine, and Vickers, London Tr. at 75-78.

<sup>396</sup> See *supra* note 187.

<sup>397</sup> DOSE OF COMPETITION, *supra* note 228.

<sup>398</sup> FTC Bureau of Economics, Roundtable on the Economics of the Pharmaceutical Industry (Oct. 2006), <http://www.ftc.gov/be/workshops/pharmaceutical/pharmaceutical.shtm>.

the 1999 BE pharmaceutical report<sup>399</sup> describing the industry and its idiosyncrasies was a precursor to much of the agency's work in the area of pharmaceutical patent settlements, which have become a major component of the FTC's competition law enforcement program. Work by OPP likewise provided insights into aspects of industries with which the agency will be dealing for the foreseeable future. These efforts include examination of the antitrust and consumer protection implications of broadband Internet access<sup>400</sup> and investigation of the effects of government restrictions on entry into online retailing.<sup>401</sup>

#### **d. Improvements in Economic Learning Applicable across Markets**

Research projects additionally help agency personnel gain insight into the effects of practices that span many industries and product markets. For example, various BE staff have undertaken a research project to examine dynamic oligopoly models.<sup>402</sup> Such models lie at the intersection of both theoretical and empirical economic research on markets, and understanding such issues may help the agency untangle knotty problems in the dynamics of gasoline and refined products pricing (for example, the analysis of asymmetric price variations in gasoline markets). A recent behavioral economics conference is another example of policy R&D at work.<sup>403</sup> In that conference, the agency tried to learn from some of the top researchers in that field, while at the same time providing the researchers with some notion of work that the FTC undertakes in the consumer protection area that considers (implicitly perhaps) the principles of behavioral economics.<sup>404</sup>

#### **e. Horizon Scanning**

Policy R&D efforts at the FTC serve the important purpose of scanning the horizon for future competition and consumer problem areas. As discussed in Chapter III.C, the agency gathers relevant industry and marketplace information by convening

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<sup>399</sup> FTC BUREAU OF ECONOMICS STAFF, ROY LEVY, *THE PHARMACEUTICAL INDUSTRY: A DISCUSSION OF COMPETITIVE AND ANTITRUST ISSUES IN AN ENVIRONMENT OF CHANGE* (1999), available at <http://www.ftc.gov/reports/pharmaceutical/drugrep.pdf>.

<sup>400</sup> See FTC STAFF, *BROADBAND CONNECTIVITY COMPETITION POLICY* (2007), available at <http://www.ftc.gov/bc/tech/cable/broadband.htm>.

<sup>401</sup> See FTC Workshop, *Possible Anticompetitive Efforts to Restrict Competition on the Internet* (Oct. 2002), <http://www.ftc.gov/opp/e-commerce/anticompetitive/index.shtm>.

<sup>402</sup> See, e.g., Michael R. Baye, *Antitrust Economics and Policy: Some Suggestions for Research Agendas*, Keynote Address at the Research Symposium on Antitrust Economics and Competition Policy, Northwestern University Searle Center on Law, Regulation, and Economic Growth, at 33-42 (Sept. 26, 2008), available at <http://www.ftc.gov/speeches/baye/080926antitrustnw.pdf>.

<sup>403</sup> See FTC Bureau of Economics, *Conference on Behavioral Economics and Consumer Policy* (Apr. 2007), <http://www.ftc.gov/be/consumerbehavior/index.shtml>.

<sup>404</sup> Roundtable panelists discussed the FTC's behavioral economics work. Lee Peeler indicated that the Bureau of Economics should have moved sooner to take a leadership role on this topic to avoid an overemphasis on the area (Peeler, 7/30 DC Tr. at 182-84), while Jack Calfee praised the reluctance of the FTC to jump into that area too early and with too much gusto (Calfee, 7/30 DC Tr. at 184-87).

conferences, workshops, and hearings to address current and emerging competition and consumer protection issues. Such events have become an important means through which the Commission and its staff identify problems and develop appropriate responses. For example, since the mid-1990s, BCP has conducted dozens of workshops and conferences focusing on Internet and consumer privacy issues, keeping the agency closer to the frontier of a quickly changing marketing environment. Similarly, OPP has chosen topics for workshops and reporting with an eye toward important future topics. For example, a recent OPP effort along these lines was a conference on new methods of health care delivery that examined progress on electronic medical records and the advent of limited-service medical clinics.<sup>405</sup>

#### **f. Self-Assessment**

Another reason the FTC undertakes policy R&D is to examine the outcomes of certain policy choices and help the agency assess how well it has done. The FTC, via its Bureau of Economics, has undertaken retrospective studies in the merger area,<sup>406</sup> in resale price maintenance, and in the area of vertical restraints.<sup>407</sup> Also in the competition realm, the 1999 study of the divestiture process by the Bureau of Competition stands out as a useful effort to determine whether the process passed at least a minimal standard for efficacy.<sup>408</sup> As discussed below in Chapter VII.B.2, the FTC's consumer protection and competition advocacy program is one of the most self-examined of all FTC activities. Through the work of one independent researcher and various internal surveys conducted by the Office of Policy Planning or its predecessors, multiple reviews have been conducted on the program to examine its value, as measured by surveys of the recipients.

#### **g. Intellectual Leadership and Learning from Others in the International Policy Arena**

As noted in Chapter IV.D, various Commission efforts – including the Commission's participation in international policy-related R&D efforts – allow the agency to influence sound competition and consumer protection policies through the import and export of policy views and enforcement practices.

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<sup>405</sup> See FTC Workshop, *Innovations in Health Care Delivery* (Apr. 2008), <http://www.ftc.gov/bc/healthcare/hcd/index.shtm>. Other nations are taking an even more direct route toward predicting future competition and consumer issues. For example, the U.K. OFT recently commissioned a project to define the upcoming issues that will likely affect consumers. See U.K. OFFICE OF FAIR TRADING, *CONSULTATION ON EMERGING TRENDS: A REPORT PREPARED FOR THE OFT BY GfK NOP* (2008), available at [http://www.of.gov.uk/shared\\_of/about\\_of/oft1000.pdf](http://www.of.gov.uk/shared_of/about_of/oft1000.pdf).

<sup>406</sup> Retrospective work in the merger area has been done since at least the early 1980s. Several recent merger retrospectives have focused on various refined products markets in the oil industry and on hospital markets. See hospital merger retrospectives cited *infra* note 718.

<sup>407</sup> For a discussion of several self-assessments undertaken by the FTC and certain other government agencies, see William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 505 (2006).

<sup>408</sup> See FTC STAFF, *A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS* (1999) [hereinafter 1999 DIVESTITURE STUDY], available at <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

A good example of the FTC's leadership efforts in international competition policy is the FTC's work building consensus in the International Competition Network, an organization dedicated to facilitating dialogue and convergence toward sound competition policy and enforcement that includes as its members nearly all of the world's competition agencies. In the course of developing work product of practical utility to its members, the ICN collectively studies issues that are susceptible to multiple approaches so that its members can better understand their implications and seek consensus about how to address them. The FTC was a founding member of the ICN and dedicates a significant portion of its international antitrust work to ICN activity. Under FTC chairmanship, for example, the ICN developed recommended practices on merger notification and review procedures<sup>409</sup> and today continues work related to their implementation. These recommended practices, designed to reduce the costs and burdens of multijurisdictional merger review, have become the international benchmark in merger review, and more than 40 of the ICN's members have introduced changes to bring their merger regimes into greater conformity with the practices since their adoption. The FTC also co-chairs the ICN's group dealing with unilateral conduct, which is acknowledged to be the most controversial area of antitrust policy, and achieved consensus on recommended practices for the assessment of dominance and on the application of unilateral conduct rules to state-created monopolies.<sup>410</sup>

A prime example of consumer protection work in a multilateral organization is the FTC's work on various OECD Council Recommendations, which have had a substantial impact on the national laws in OECD countries. The FTC took a leading role in the research and related work leading to the OECD Council's adoption in 2003 of a Recommendation on protecting consumers across borders against fraud and deception.<sup>411</sup> The Recommendation was based in part on empirical input provided by the International Consumer Protection Enforcement Network, which FTC staff took a lead role in generating. This work has had a substantial impact on national legislation: the Recommendation and underlying research served as the basis for both the United States and the European Commission to pass new laws governing cross-border information sharing and investigative assistance in consumer protection matters, including the U.S. SAFE WEB Act of 2006<sup>412</sup> in the United States and the Consumer Protection

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<sup>409</sup> ICN MERGER WORKING GROUP, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (2006), *available at*

<http://www.internationalcompetitionnetwork.org/media/archive0611/mnprepractices.pdf>.

<sup>410</sup> *See* ICN UNILATERAL CONDUCT WORKING GROUP, DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS: RECOMMENDED PRACTICES (2008), *available at* [http://www.internationalcompetitionnetwork.org/media/library/unilateral\\_conduct/Unilateral\\_WG\\_1.pdf](http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf).

<sup>411</sup> OECD, GUIDELINES FOR PROTECTING CONSUMERS FROM FRAUDULENT AND DECEPTIVE COMMERCIAL PRACTICES ACROSS BORDERS (2003), *available at* <http://www.oecd.org/dataoecd/24/33/2956464.pdf>. This work was an outgrowth of the 1999 OECD guidelines in the area of electronic commerce. *See* OECD, GUIDELINES FOR CONSUMER PROTECTION IN THE CONTEXT OF ELECTRONIC COMMERCE (1999), *available at* <http://www.oecd.org/dataoecd/18/13/34023235.pdf>. The FTC also played a leading role in developing those guidelines.

<sup>412</sup> Pub. L. No. 109-455, 120 Stat. 3372 (codified as amended in scattered sections of 15 U.S.C.).

Cooperation Regulation<sup>413</sup> in Europe. Following the issuance of the Cross-Border Fraud Recommendation, the FTC played a pivotal role in developing the background research for the OECD Council's adoption in 2007 of a Council Recommendation on Dispute Resolution and Redress.<sup>414</sup> Like the Cross-Border Fraud Recommendation, the Dispute Resolution and Redress Recommendation is serving as a basis for strengthening consumer redress mechanisms in other jurisdictions.<sup>415</sup>

Also within the OECD, the FTC has significantly contributed to work in the privacy and data security area. For example, the agency worked closely with its counterparts within the OECD's Working Party on Information Security and Privacy in an effort to promote greater cooperation among privacy regulators and law enforcement authorities to promote greater protection for personal information. This effort, which began with research, a written report, and a roundtable discussion, led to the 2007 OECD Recommendation on Cross-Border Co-operation in the Enforcement of Laws Protecting Privacy,<sup>416</sup> which provides guidance on how to improve cooperation in this area.

The same approach also has been used in the FTC's bilateral relations with other nations. Since the early days of their relationship under the 1991 EC-U.S. cooperation agreement, the FTC, DOJ, and the European Commission have jointly conducted studies – for example, of merger notification requirements, merger remedies, and retrospective reviews of merger remedies – to better understand each other's rules and procedures and, thereby, foster cooperation and coordination in parallel merger reviews. In 2001, the General Electric/Honeywell merger case exposed a significant divide between the U.S. and European approaches to nonhorizontal merger analysis.<sup>417</sup> Rather than allow their differences to fester and possibly threaten other transactions, the FTC, DOJ, and the EC jointly embarked on a project to study their approaches to mergers, both substantive and procedural, with a focus on nonhorizontal issues (where there appeared to be the greatest potential variance).

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<sup>413</sup> Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R2006:EN:HTML>.

<sup>414</sup> OECD, RECOMMENDATION ON DISPUTE RESOLUTION AND REDRESS (2007), available at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.

<sup>415</sup> The European Commission, for example, has focused on exploring individual judicial and collective redress mechanisms for consumers since the issuance of the OECD Dispute Resolution and Redress Recommendation. A summary of the ongoing work on collective redress mechanisms is available at [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm).

<sup>416</sup> OECD, RECOMMENDATION ON CROSS-BORDER CO-OPERATION IN THE ENFORCEMENT OF LAWS PROTECTING PRIVACY (2007), available at <http://www.oecd.org/dataoecd/43/28/38770483.pdf>.

<sup>417</sup> See, e.g., William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Conglomerate Mergers And Range Effects: It's A Long Way From Chicago To Brussels*, Address before George Mason University Symposium (Nov. 9, 2001), available at <http://www.usdoj.gov/atr/public/speeches/9536.htm>.

## **h. Reporting on Agency Activity**

A portion of the FTC's policy R&D work is focused on describing what the agency does. Although this work is not always thought of as research, it increases the transparency of the agency's processes and decision making. For example, efforts at providing enforcement guidelines (on the antitrust side) and industry guides (on the consumer protection side) fall into this category, as do the occasional closing statements regarding FTC merger cases that are not pursued.<sup>418</sup>

## **i. Fostering FTC-relevant Academic Research**

Finally, as discussed in more detail above in Chapter IV.G, by having an agency-specific research agenda, the FTC can answer questions not necessarily addressed by academics, as well as potentially stir interest in such topics on the part of members of the academy.

## **3. Setting a Research Agenda**

Given the prominent role of policy research and development at the FTC, having a systematic means for identifying and planning relevant research is imperative. This section reviews historical and current approaches to selecting research topics at the agency, as well as considerations for setting a research agenda. This section concludes with a review of research topics that were proposed in the course of external consultations.

## **a. Historical Selection of Research Topics**

The FTC's broad jurisdiction over industry implies a very broad array of possible research areas. In its early years, most general investigations undertaken by the FTC were based on requests from the President or from Congress. Even after the Commission began to initiate numerous studies on its own, many investigative reports continued to be undertaken based on congressional requests. The pattern of external requests changed in the post-World War II era, when many more reports were begun under Commission auspices. Whatever the cause,<sup>419</sup> congressional requests decreased and the Commission

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<sup>418</sup> Guidelines and industry guides are discussed in more detail in Chapter VI.B.5; closing statements are discussed in more detail in Chapter VI.B.1.

<sup>419</sup> At a 2003 BE history roundtable, two former BE directors discussed the decline of congressional and presidential requests for reports. Michael Lynch argued that the decline was likely the result of competition in report writing from an increasing number of congressional staffers and from the advent of other organizations which operated in areas of traditional FTC focus, such as oil, meat packing, and agricultural products. BE History Roundtable, *supra* note 125, at 175-77. Organizations such as the Government Accountability Office, Congressional Budget Office, and the Energy Information Agency have economic analysts and other researchers who can undertake microeconomic research and are available to Congress to write reports. An alternative theory for the decline in presidential and congressional requests, put forward by Willard Mueller, was that an increase in industry influence resulted in a reduction in such requests. *Id.* at 177-79.

itself became a larger source of ideas for studies in the 1940s and the level of reporting in general fell.

Ideas for research topics from within the FTC have come from many sources. Several studies have been essentially staff-initiated; many have been projects promoted by the agency Chairman or the Commission; and others have been sponsored by multiple bureaus. It is often difficult to identify a single source of a research idea. Often the specific ideas come from staff, but with encouragement from agency leaders who may have identified general areas for investigation. Other times, ideas for studies follow from previous projects. In other instances, congressional interest, if not a direct congressional request, might instigate a study.

### **b. Current Approach to Research Topic Selection**

As was true historically, in more recent times FTC research ideas have come from a variety of sources. One apparent change, however, has been a recent increase in the number of congressional mandates for research of various types. During the past few years, a large portion of the research work has been generated by presidential or congressional requests for examinations of various competition and consumer protection issues. Such work has included, for example, competition in the contact lens marketplace,<sup>420</sup> the levelness of the playing field for the U.S. Postal Service and its private market rivals,<sup>421</sup> grocery retail slotting allowances,<sup>422</sup> and media violence.<sup>423</sup>

Beyond these external requests, much recent FTC research has been initiated by the agency's Chairs. Such Chair-initiated work has included policy R&D efforts involving the implications of the state action doctrine for competition law enforcement and regulation,<sup>424</sup> health care competition and information issues,<sup>425</sup> and various efforts to improve the transparency of the merger review process by releasing data on recent merger decisions and analyses of such data.<sup>426</sup> The 1996 reports on competition and

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<sup>420</sup> See FTC, THE STRENGTH OF COMPETITION IN THE SALE OF RX CONTACT LENSES: AN FTC STUDY (2005), available at <http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf>.

<sup>421</sup> See FTC, ACCOUNTING FOR LAWS THAT APPLY DIFFERENTLY TO THE UNITED STATES POSTAL SERVICE AND ITS PRIVATE COMPETITORS (2007), available at <http://www.ftc.gov/os/2008/01/080116postal.pdf>.

<sup>422</sup> See FTC STAFF, SLOTTING ALLOWANCES IN THE RETAIL GROCERY INDUSTRY: SELECTED CASE STUDIES IN FIVE PRODUCT CATEGORIES (2003), available at <http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf>.

<sup>423</sup> See 2000 MEDIA VIOLENCE REPORT, *supra* note 391.

<sup>424</sup> See FTC STAFF, REPORT OF THE STATE ACTION TASK FORCE (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

<sup>425</sup> For a description of some of the FTC's policy R&D efforts in the health care area, see <http://www.ftc.gov/bc/healthcare/research/behealthcare.htm>.

<sup>426</sup> See, e.g., FTC, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2007 (2008), available at <http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf>.

consumer protection policy in the twenty-first century in a global, high-tech marketplace were other notable Chairman-initiated endeavors.<sup>427</sup>

Non-Chairman Commissioners also have participated extensively in the formulation of policy R&D projects, such as the examination of the municipal provision of Wi-Fi Internet connectivity technology,<sup>428</sup> a recent workshop on the appropriate scope of the “unfair methods of competition” language in Section 5 of the FTC Act,<sup>429</sup> and a workshop on vertical restraints currently in development.<sup>430</sup>

As has been true throughout the history of the FTC, many recent agency research projects have been staff-initiated.<sup>431</sup> A few recent examples include comparisons over time of television-based food marketing to children,<sup>432</sup> the effects of various regulations on the provision of information in food advertising,<sup>433</sup> and a customer survey of rent-to-own transactions.<sup>434</sup>

In the recent past, the research production process within the agency largely has been handled independently by each economic or legal organization. The choices of topics and the approach to the research problem are generally decided within each group. For example, within the Bureau of Economics, research projects are sometimes initiated by economists who have been given small grants of time to undertake undirected research. This research is monitored twice each year, but the review is intentionally light-handed. As the projects within BE get larger and more formal, more review is undertaken. For example, if an economist wanted the FTC to purchase relatively low-

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<sup>427</sup> See FTC STAFF, ANTICIPATING THE 21<sup>ST</sup> CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996), available at [http://www.ftc.gov/opp/global/report/gc\\_v1.pdf](http://www.ftc.gov/opp/global/report/gc_v1.pdf); FTC STAFF, ANTICIPATING THE 21<sup>ST</sup> CENTURY: CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996), available at [http://www.ftc.gov/opp/global/report/gc\\_v2.pdf](http://www.ftc.gov/opp/global/report/gc_v2.pdf).

<sup>428</sup> See FTC STAFF, MUNICIPAL PROVISION OF WIRELESS INTERNET (2006), available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>.

<sup>429</sup> See FTC Workshop, Section 5 of the FTC Act as a Competition Statute (Oct. 2008), available at <http://www.ftc.gov/bc/workshops/section5/index.shtml>.

<sup>430</sup> See FTC Press Release, FTC Announces Public Workshops for Next Year on Resale Price Maintenance (Oct. 28, 2008), available at <http://www.ftc.gov/opa/2008/10/rpmwksp.shtm>.

<sup>431</sup> Staff-initiated projects are often influenced generally by overall agency preferences for research. For example, without naming a particular research area or research question, a Chairman who indicates an interest in research in broad areas of policy can induce effort by the staff to find projects that fit in those policy areas.

<sup>432</sup> See FTC BUREAU OF ECONOMICS STAFF, DEBRA J. HOLT, PAULINE M. IPPOLITO, DEBRA M. DESROCHERS & CHRISTOPHER R. KELLEY, CHILDREN’S EXPOSURE TO TV ADVERTISING IN 1977 AND 2004: INFORMATION FOR THE OBESITY DEBATE (2007), available at <http://www.ftc.gov/os/2007/06/cabecolor.pdf>.

<sup>433</sup> See FTC BUREAU OF ECONOMICS STAFF, PAULINE M. IPPOLITO & JANIS K. PAPPALARDO, ADVERTISING NUTRITION & HEALTH: EVIDENCE FROM FOOD ADVERTISING 1977-1997 (2002), available at <http://www.ftc.gov/opa/2002/10/advertisingfinal.pdf>.

<sup>434</sup> See FTC BUREAU OF ECONOMICS STAFF, JAMES M. LACKO, SIGNE-MARY MCKERNAN & MANOJ HASTAK, SURVEY OF RENT-TO-OWN CUSTOMERS (2000), available at <http://www.ftc.gov/reports/renttoown/renttoownr.pdf>.

cost data for a project, then the research would be reviewed by an ad hoc research committee prior to initiation of the project. Parties outside BE, however, usually would not be consulted. As projects increase in scope, the BE director and the Chairman's office eventually get involved. If data were to be obtained via compulsory process of some sort, the relevant legal bureau and the General Counsel's office also would become immersed in that aspect of the project.

Similarly, other agency units – such as OPP, the BC Policy and Coordination Office, and the General Counsel's Policy Studies group – generate, monitor, and produce their own research products. Even if the policy R&D projects are assigned to the organization rather than internally generated, the plans for the project are typically reviewed only within each organization (apart, of course, from informing the Chairman and any organization leadership). The organizations typically do not turn to others for review of their proposals or methods. Certain large projects might involve staff from other organizations – particularly economists if data manipulation or analysis is involved in the study – however, there would not typically be much cross-organization review of the study proposal or study methods.<sup>435</sup>

### **c. Considerations for Setting a Research Agenda Going Forward**

There are several steps in the research process, including defining the broad topic areas of interest for research, generating interesting, policy-relevant, and achievable ideas within a topic area, and producing and monitoring the research. As discussed in the previous section, in the recent past these tasks largely have been handled within each FTC bureau or office. In principle, these tasks could be accomplished either in such a decentralized manner or through a more systematic, centralized process involving the simultaneous collection of research ideas from multiple sources, coordination of topic choices, and then monitoring of output.<sup>436</sup>

The selection of an optimal research process likely depends on the type of work and output envisioned, as well as the effects on researcher incentives. Those staff members who do research and have good research ideas typically are the most motivated to aggressively pursue those ideas. Therefore, it is useful to allow staff members with

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<sup>435</sup> Top managers in each organization in the FTC learn about the existence and status of policy R&D projects from the materials produced for semiannual management retreats and through monthly and weekly reports prepared by the various organizations describing those activities.

<sup>436</sup> Those roundtable panelists addressing the issue of appropriate sources for research ideas seemed to think that good ideas might come from anywhere and that there is no reason to limit the sources of such ideas. *See, e.g.*, DeSanti, 7/29 DC Tr. at 128; Rubin, 7/30 DC Tr. at 176. The U.K. OFT recently used a Web-based moderated dialogue approach to determine areas of current policy interest among academics, business leaders, and others who might have useful ideas for pursuing policy R&D. The EC's DG SANCO also has recently undertaken extensive surveys in its Consumer Markets Scoreboard project to identify areas of consumer dissatisfaction across the EU, which effort may be useful as a means of defining areas ripe for policy R&D.

interesting and feasible research ideas to pursue such ideas.<sup>437</sup> A process that solicits ideas that are then taken from the idea generator likely will produce only very general ideas. Such a process might be useful, however, if it is not costly and if general ideas (as opposed to specific research plans) are the desired output.

Some roundtable panelists discussed the policy R&D process and suggested rather different approaches. Former BE Director Michael Salinger, for instance, argued that combining the agency's policy groups might be sensible, but that the Bureau of Economics research work should remain independent of the legal policy shops and that the research process should remain decentralized.<sup>438</sup> One rationale for such a view would be that the attorney-led organizations tend to produce top-down, workshop-intensive studies of a similar type, while BE tends to produce more academic products with a bottom-up orientation. In contrast, two former heads of legal policy shops, Susan DeSanti<sup>439</sup> and Joseph Kattan,<sup>440</sup> favored a more centralized approach under which ideas from a wide variety of sources would be vetted early and production would be centrally controlled through an agency-wide committee (which presumably would report to the Chairman or the Commission). The goals of such an approach would be to better control the chosen topics – for example, to select projects that relate more closely with current enforcement or advocacy priorities – and to coordinate resource deployment across several relatively autonomous groups.

Two panelists independently described a staff/academic collaborative model of research that would pursue a systematic research agenda based largely on agency-provided data on competition issues.<sup>441</sup> The thrust of the argument in favor of this model was that the FTC could gain by inducing collaboration from academics and their graduate students through a data-provision scheme, in which academics gain access to the agency's internal and external data for research purposes in exchange for their research efforts. Such collaboration might be furthered through visits from academics during summers and sabbaticals.<sup>442</sup> Former BE Director Luke Froeb also discussed the possibility of devising a general agenda by asking three questions: (1) What do you want

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<sup>437</sup> At least one panelist argued that allowing bottom-up research to occur was essential to maintaining a research program. *See* Rubin, 7/30 DC Tr. at 176-77.

<sup>438</sup> Salinger, 7/29 DC Tr. at 168-69.

<sup>439</sup> DeSanti, 7/29 DC Tr. at 128-31, 153.

<sup>440</sup> Kattan, 7/29 DC Tr. at 167-68.

<sup>441</sup> *See* Nevo, Chicago Tr. at 277-88; Rose, Boston Tr. at 134-36. Aviv Nevo's general argument for stronger academic ties was also made by Nancy Rose, who suggested annual or biennial conferences with academics on topics of interest, such as retrospectives, as well as expanded use of visiting academics and developing ties with the National Bureau of Economic Research.

<sup>442</sup> The Bureau of Economics currently has some ties to the academic community through its seminar series and through its visiting scholars program – which brings in academics to the bureau for year-long visits – and occasional joint research projects. BE also has recently joined with Northwestern University's Searle Center on Law, Regulation, and Economic Growth and Northwestern's Center for the Study of Industrial Organization to co-sponsor an annual microeconomics conference to strengthen those academic ties. *See supra* note 322.

the information for?; (2) What do you want to know? (And can we know the long-run effects?); and (3) What can we learn that will alter what we do?<sup>443</sup>

On their face, these suggestions present very different notions about the best mechanism to produce research. However, depending on which projects are included in the centralized scheme, these visions may not be as different as they initially appear. If one is searching for policy ideas to be explored in workshops or hearings, then a formalized topic selection process and report production scheme may be feasible. Obtaining ideas from a large set of sources might provide a richer choice set. Some level of coordination of the large externally and Commission-driven projects also might be appropriate. Currently, those projects are controlled by an assigned group, but higher-level coordination almost always occurs and centralization might make that process proceed more smoothly. Whether such coordination needs to entail centralized control of production is a more difficult issue, as that may unfavorably alter incentives. As discussed above, individual staff members and organizations may not devote substantial resources to developing good projects if those projects are then taken over by other organizations. In addition, a centralized model would not make much sense for the smaller, bottom-up research projects because centralization would add little value and discourage development. Central planning can identify broad areas of interest, but it is very unlikely to produce specific achievable project ideas. The ideas for any interesting projects likely will have to be done on a less prescribed basis. Furthermore, the impetus for some of the best policy-relevant economic research is often the recognition of a new data source or method of analysis that could be used to shed light on questions surrounding a particular policy. A high degree of centralization may cause such opportunities to go unrecognized.

Based on discussions with managers in various other governmental economic policy shops, research – particularly bottom-up economic or scientific research – seems to be a decentralized activity in many government organizations.<sup>444</sup> For a segment of the research work, researchers tend to generate their own ideas within relevant bounds and pursue the topics with little oversight. Another segment of policy R&D work is directed or top-down research and the production of those outputs is more heavily monitored. Even in that context, however, the monitoring appears to be handled within a relatively small group, rather than coordinated across groups.

To generate useful policy R&D topics for large projects, without imposing unnecessary costs on smaller, more research-oriented projects, perhaps a review process that differs by level of resource commitment might be the best schema. This might

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<sup>443</sup> Froeb, 7/30 DC Tr. at 214-17, 269. Froeb ultimately, however, did not think a broad systematic agenda would be very helpful and suggested narrow efforts to examine opportunistically the outcomes of market events.

<sup>444</sup> Interviews regarding the research process and policy work at DG Comp, the Federal Reserve Board, the Congressional Budget Office, the Commerce Department's Bureau of Economic Analysis, and the DOJ Antitrust Division's Economic Analysis Group were conducted in June and September, 2008. Each of those agencies makes use of economists and each produces some policy outputs. However, the FTC appears to undertake more noneconomist research and policy work than do the other organizations.

maintain flexibility and reduce bureaucracy at the low end, while improving monitoring at the upper end. Recent FTC Chairmen have used a combination of weekly and monthly reports and semiannual senior management retreats to review the progress of ongoing projects and to promote potential new ideas.

For relatively smaller projects – such as those proposed by the economics staff that do not require significant data purchases and that have working papers or private publication in journals as the envisioned output – little review or monitoring is required. For instance, the Bureau of Economics currently handles such undirected research via a time grant process and periodic monitoring by managers in its recently established Office of Applied Research and Outreach.<sup>445</sup>

Occasionally, staff propose projects that may require significant time and some data expense, but not require compulsory process or expensive data purchases. For such projects, proposal preparation by the author and bureau/office review has been the norm. Managers within the organization have provided oversight of the project.

Projects that require major data purchases or that grow directly from the agency's agenda, projects requiring compulsory process, and congressionally requested projects may warrant more monitoring and control than do the smaller projects discussed previously. Such large project proposals could be made subject to an intra-agency review process, if such a process would add value or allow for better resource allocation decisions. The cost would be some loss of autonomy and responsibility for the individual group leading the project and perhaps for the individual authors, but that price may be offset by gains in coordination or in improved topic selection.<sup>446</sup>

#### **d. Selected Research Ideas Identified during External Consultations**

Roundtable panelists provided a wide array of specific suggestions for research topics. The most frequently mentioned area for research was examination of outcomes following merger reviews – that is, merger retrospectives.<sup>447</sup> As discussed below in Chapter VII, however, there was a significant divergence of opinion regarding the value of such work. Related to the merger retrospective work, the testing of merger simulation

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<sup>445</sup> Each of the interviews with other government organizations indicated that offering at least some amount of this type of research time was important to meet the market for research-capable Ph.D. economists, especially for newly minted Ph.D.s.

<sup>446</sup> One approach to idea generation might entail use of a research staff person who occasionally (perhaps annually) collects general policy R&D ideas from across the agency and from informed outsiders, and culls that list down for further consideration. Those general ideas that have the most merit could then be forwarded to organizations within the agency for preparation of specific project proposals. The best proposals might then be chosen for action, with the specific shop that generated the chosen idea/proposal being given responsibility for production. The staffer could monitor and report on progress, but would not necessarily control the production process.

<sup>447</sup> See, e.g., Ghosal, 7/30 DC Tr. at 242-43, 273-74; Picker, Chicago Tr. at 166-69; Scheffman, NY Tr. at 79-80.

models also was proposed as a project.<sup>448</sup> Such efforts would be aimed at determining whether any of the theoretical models of oligopoly behavior that drive the simulation results fit actual merger outcomes. Some such work has been undertaken recently by two FTC economists, as well as an economist at DOJ.<sup>449</sup>

Beyond merger retrospectives and simulations, several other competition topics were suggested. Perhaps the leading topic currently among antitrust-focused academics is bundled discounts, including so-called “all units” discounts.<sup>450</sup> The London roundtable produced suggestions for research on two-sided markets and the implications of behavioral economics for competition policy,<sup>451</sup> as well as consumer goods and services monopolies that produce consumer “lock-in” in the aftermarket stage.<sup>452</sup>

Studies of the effects of resale price maintenance and single-firm market power also were mentioned, although not everyone was confident such work could actually be done in a convincing fashion.<sup>453</sup> Retrospective work on remedies also was proposed.<sup>454</sup>

Several participants proposed studies of regulatory effects, particularly in the telecommunications arena. Two economists described a previous BE staff study of the Federal Communication Commission’s must carry rules as a model for future efforts to find natural experiments to test theories of exclusion.<sup>455</sup> The idea of looking for natural experiments (that sometimes occur in locally regulated industries) was a theme that reappeared several times during the external consultations in various guises.<sup>456</sup>

Calls for generalized studies of industry also were forthcoming. Salinger lauded such studies as being helpful to get to essential factual issues of conduct affecting an

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<sup>448</sup> See Wickelgren, Nevo, and Carlton, Chicago Tr. at 231-41.

<sup>449</sup> See Matthew C. Weinberg & Daniel Hosken, *Using Mergers to Test a Model of Oligopoly* (University of Georgia Department of Economics Working Paper, 2008), available at <http://www.ftc.gov/be/workshops/microeconomics/docs/mweinberg.pdf>; Craig Peters, *Evaluating the Performance of Merger Simulation: Evidence from the U.S. Airline Industry*, 49 J.L. & ECON. 627 (2006).

<sup>450</sup> See Werden, 7/30 DC Tr. at 267-68.

<sup>451</sup> See Vickers, London Tr. at 78-79.

<sup>452</sup> See Fingleton, London Tr. at 61-62.

<sup>453</sup> Compare Werden, 7/30 DC Tr. at 247-50, with Carlton, Chicago Tr. at 255-57.

<sup>454</sup> See Heyer, 7/30 DC Tr. at 89-90; Leveque, Paris Tr. at 112; First, NY Tr. at 78.

<sup>455</sup> See Froeb and Hazlett, 7/30 DC Tr. at 259-60, 269-70. The panelists discussed Michael G. Vita, *Must Carry Regulations for Cable Television Systems: An Empirical Analysis*, 12 J. REG. ECON. 159 (1997). The natural experiment in Vita’s paper was the elimination of the must carry rules in the late 1980s on First Amendment grounds. This exogenous change in the regulatory regime gave cable systems discretion as to which (if any) local stations they would carry; it allowed clean testing of various hypotheses about the rationale for cable system carriage decisions. Nevo echoed Froeb’s call for opportunistic use of data to test the effects of various competition policy choices. Nevo, Chicago Tr. at 284.

<sup>456</sup> Two participants indicated that China’s new competition law may provide a fertile area for opportunistic examination of the effects of antitrust generally in that nation. See Shapiro and Carlton, Chicago Tr. at 208, 212.

industry.<sup>457</sup> Sector studies were suggested, as were broad studies of issues that cut across sectors, such as entry.<sup>458</sup> OFT Chief Executive John Fingleton discussed the importance of long-term sectoral studies as tools for relationship building, which can serve as effective means of both staying informed of industry conduct and providing a softer means of enforcement.<sup>459</sup> Simon Pritchard of the OFT said that sectoral relationships built through ongoing studies are very important to achieving regulatory outcomes by preventing or deterring anticompetitive conduct in advance, which is a positive result reached at much lower costs to the agency.<sup>460</sup> During the OFT consultation, staff discussed how a sector study enables the agency to obtain baseline data relevant to competitive conditions, which can prove useful in subsequent investigations.<sup>461</sup> At the Tokyo roundtable, panelists discussed how, for the last 10 years, the JFTC has performed and published about 30 such sector studies, which have enabled the agency to better grasp the state of affairs in the marketplace.<sup>462</sup>

One panelist proposed studies that would identify the types of evidence that appear to be persuasive to federal judges in antitrust litigations.<sup>463</sup> Another participant suggested that the FTC examine the effects of the substantial changes in U.S. antitrust policy over the past 20 years.<sup>464</sup>

On the consumer protection side, roundtable panelists mentioned advertising and the regulated professions as useful areas for re-examination. Regarding advertising, suggested areas for study included an examination of how well disclosures in advertising really work – that is, are they seen, read, and comprehended, and how might one evaluate the meaning and message of ads without text?<sup>465</sup> In addition, one participant noted the proliferation of anti-aging claims of various sorts aimed at the aging Baby Boomer generation, suggesting that those areas might provide fertile ground for studies.<sup>466</sup>

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<sup>457</sup> Salinger, 7/29 DC Tr. at 139-40.

<sup>458</sup> See Leveque, Paris Tr. at 112; Krattenmaker, 7/30 DC Tr. at 94-95; Calkins, 7/30 DC Tr. at 116-17; Consultation with DG Comp, Oct. 21, 2008.

<sup>459</sup> Fingleton, London Tr. at 55-56.

<sup>460</sup> Pritchard, London Tr. at 99.

<sup>461</sup> Consultation with OFT, Sept. 11, 2008. OFT staff explained that by gathering the baseline data through a market study, the agency may obtain more information relative to the limited set of data that is obtainable through a particular investigation. *Id.*

<sup>462</sup> Tokyo Roundtable, Oct. 7, 2008.

<sup>463</sup> See Swire, NY Tr. at 86.

<sup>464</sup> See Rose, Boston Tr. at 94.

<sup>465</sup> See Greenbaum, NY Tr. at 194-96 (addressing disclosures); Swire, NY Tr. at 198-99 (addressing ads without text).

<sup>466</sup> See Levine, NY Tr. at 197.

Similar to the calls for more advocacy-related research, examination of the effects of regulations by non-market-oriented regulatory agencies also was proposed.<sup>467</sup> In addition, critically examining the implications of behavioral economics in market settings was discussed.<sup>468</sup> Study of online behavioral advertising also was proposed as a useful addition to the FTC research agenda.<sup>469</sup>

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Agency leadership must motivate the staff to pursue the agency's mission, both by clearly communicating that mission to staff and by listening to staff's input on how best to achieve the mission. Strategic planning allows the agency to identify competition and consumer protection problems on the horizon, as well as determine which tool or tools with which to address such problems. Policy R&D is a necessary foundation for tackling the challenging competition and consumer protection policy issues that the agency has been tasked with addressing. The FTC's efforts in these three areas – leadership, planning, and research – significantly impact the agency's ability to deploy its resources in an effective manner. The following chapter addresses how the agency currently deploys its resources, as well as how it might improve on such deployment in the future.

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<sup>467</sup> MacLeod (7/30 DC Tr. at 177-80) and Calfee and Rubin (7/30 DC Tr. at 171-76) argued that the best FTC research historically was that focused on policies of other regulatory agencies (for example, those involving restrictions in the areas of advertising, optometry, and legal services). Supporting that view, a panelist at the Paris roundtable noted that the FTC study on the effects of advertising on the practice of optometry is over 20 years old but remains the best in its class. Philips, Paris Tr. at 131-32.

<sup>468</sup> See Rubin, 7/30 DC Tr. at 171-72, 187-89; Peeler, 7/30 DC Tr. at 183; Calfee, 7/30 DC Tr. at 184-87. In addition, Peter Swire suggested that the FTC more thoroughly examine the connections between behavioral economics and experimental economics and their implications for online commerce. Swire, NY Tr. at 198-99; Written Submission of Peter P. Swire, Oct. 29, 2008, at 6-7.

<sup>469</sup> See Swire, NY Tr. at 198-99.

## VI. Deployment of Agency Resources

This chapter discusses the FTC’s deployment of resources in pursuit of its competition and consumer protection missions, identifying considerations that might guide such deployment. Section A addresses general issues involving the allocation of resources across the agency’s many functions. Section B reviews the FTC’s resource deployment options, illustrating the many tools – such as enforcement, advocacy, research, and education – available to the agency.

### A. General Issues Involving Resource Allocation

An agency’s allocation of its scarce resources undoubtedly is one of the most significant determinants of its ultimate success. Once it identifies a desired outcome – for example, a reduction in the number of deceptive weight-loss claims – a successful agency will make optimal use of its tools to achieve that outcome

Resource allocation, then, is to a large extent a matter of picking the right tool or tools from the FTC’s existing arsenal – or adding new tools to that arsenal – to best address the matter at hand. At the Chicago roundtable, then-BE Director Michael Baye framed the analysis in terms of being at the right point of “a production possibilities curve that doesn’t have guns and butter on it but has all the different outputs that the Federal Trade Commission can produce.”<sup>470</sup> A roundtable panelist suggested that, assuming the FTC seeks to deploy its resources in such a manner as to maximize consumer welfare, the agency should engage in efforts that produce “the biggest gain to marginal consumer welfare.”<sup>471</sup>

Resource allocation decisions also should consider the potential costs, to the public as well as the agency, of pursuing particular activities. A senior OFT official observed that an agency’s tools vary in terms of the risk and cost associated with each of them. The OFT, he continued, is able to achieve certain outcomes at a lower cost by employing “softer enforcement,” such as building relationships with key stakeholders and other advocacy efforts, rather than “swinging heavy tools around at high costs.”<sup>472</sup> Another panelist cautioned that, when deciding where to devote resources, an agency should consider more carefully the cost of making a wrong decision in bringing a case or taking some other action.<sup>473</sup>

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<sup>470</sup> Baye, Chicago Tr. at 268.

<sup>471</sup> Elhauge, Boston Tr. at 25. Another roundtable panelist maintained that the resource allocation issue should be framed more broadly, explaining that “the question should not be how the FTC can allocate its resources, it should be how the United States should allocate its resources. You’re sub-optimizing if you simply look at what the FTC can do to make the best of the resources it has.” Angland, NY Tr. at 26.

<sup>472</sup> Pritchard, London Tr. at 97-98.

<sup>473</sup> See Heyer, 7/30 DC Tr. at 110 (“If you had reason to believe that with some reasonable probability, maybe only 30 percent, permitting [a] merger could lead to wonderful things for the economy, in a circumstance like that, you might want to think twice before bringing the case.”).

Tool selection, much like strategic planning, should include a certain amount of flexibility.<sup>474</sup> It may be the case, for example, that business education and policy R&D efforts such as workshops are the best tools to address a relatively new and complicated issue in the marketplace. However, if there is an insufficient response on the part of industry to such efforts, it may be that enforcement actions are necessary to more effectively accomplish the agency's objectives on such issue.

In addition to general praise for the FTC's allocation of its resources,<sup>475</sup> roundtable panelists had specific suggestions for such allocation. Most significantly, a fairly broad consensus formed around the idea that, although law enforcement is a primary function of the FTC, the Commission needs to remain more than just an enforcement agency. As former Chairman Timothy Muris explained, on the antitrust side, to be recognized as really doing your job, it is necessary, but not sufficient, to bring cases.<sup>476</sup> According to former BC Director Susan Creighton, the mission on both sides of the agency is to preserve the effectiveness of markets. The overall priority of the agency thus is to determine where there are instances of market failure and to address those. Sometimes the best tool to do that will be enforcement; sometimes, however, enforcement is not the right tool.<sup>477</sup> Former BC Director Richard Parker noted that in pursuing a particular policy, the agency cannot rely solely on law enforcement because the right cases may not present themselves; it may be that other tools, such as guidelines, for example, will need to be used to pursue the desired policy.<sup>478</sup>

Panelists also offered various suggestions as to how the agency should make resource allocation decisions. One panelist cautioned against focusing on a particular area or issue merely because it is novel. According to the panelist, the FTC has focused

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<sup>474</sup> See, e.g., Pritchard, London Tr. at 105 (“We don’t hesitate to switch tools[;] . . . if we find that actually there is a nut that does not crack with some hammer then we are not wedded to sticking to the original tool.”).

<sup>475</sup> See, e.g., Heyer, 7/30 DC Tr. at 98 (“I think that whatever their resources happen to be, they’re allocating them reasonably nicely.”) (complimenting specifically the agency’s efforts in the competition advocacy and international arenas); Krattenmaker, 7/30 DC Tr. at 114-15 (“I think that the things you choose to do are generally very well selected. I think the way you allocate your resources is well done.”); Wilks, London Tr. at 37-38 (characterizing the agency’s nonlitigation efforts – including, for example, competition advocacy, consumer education, and competition R&D – as having been “extraordinarily productive and successful in building legitimacy and consen[sus]”).

<sup>476</sup> Muris, 7/29 DC Tr. at 54. See also Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 213-14 (2005) (“Another important change in the Commission’s approach to regulation, contributing to its enhanced status, involves the recognition that the FTC was not created solely as a law enforcement agency. Rather, it was established in 1914 to work with the private sector, provide advice about possible violations, anticipate and study economic trends and developments, and anticipate and report to the White House, Congress, and the public likely economic problems.”).

<sup>477</sup> Creighton, 7/29 DC Tr. at 75-76.

<sup>478</sup> Parker, 7/29 DC Tr. at 118. See also T. Schwartz, Chicago Tr. at 48 (arguing that, although law enforcement plays an “important part” in the agency’s mission, it should include more than just enforcement); Bernstein, 7/29 DC Tr. at 53 (suggesting that the agency ought to be “beating a drum at the ABA and elsewhere” about the agency’s accomplishments outside the litigation context).

resources on “new and burgeoning” areas, and there are benefits to that course, including “sending a message of deterrence right at the outset where you see the potential for fraud.” He cautioned, however, that the agency should not address an area simply because it is new; it must be important as well.<sup>479</sup> Another panelist suggested that the agency’s resources might be focused “more on what the FTC can do distinctively because that may be where the biggest marginal gains are.”<sup>480</sup> In other words, asked the panelist, what can the FTC do that neither the DOJ nor private antitrust actions can do?<sup>481</sup> Similarly, another panelist asserted: “In an era of limited resources, the focus of the agency should be where two criteria are met: (1) a topic has important effects on consumers; and (2) the FTC has a significant advantage in effectiveness compared with other possible ways to address the topic[, including, for instance,] state enforcement, enforcement by agencies in other countries, self-regulation, or reliance on market forces.”<sup>482</sup>

Finally, former General Counsel Stephen Calkins complimented the simultaneous use of agency tools within a specific area. Citing the example of recent FTC (and DOJ) actions in the real estate brokerage industry, Calkins argued that “that actually is an example of the whole process working well because the agencies are litigating and doing advocacy and doing [policy] R&D and using a whole panoply of their resources, which I tend to think is when things work best. . . . My guess is that that linking together is what really works.”<sup>483</sup>

## **B. The FTC’s Many Resource Deployment Options**

### **1. Law Enforcement/Litigation**

The FTC’s law enforcement authority encompasses both consumer protection and antitrust. The basic consumer protection statute enforced by the Commission is Section 5(a) of the FTC Act, which declares unlawful “unfair or deceptive acts or practices in or affecting commerce.”<sup>484</sup> Drawing on a 1980 Commission policy statement, Congress in 1994 defined “unfair” practices as those that “cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not

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<sup>479</sup> Brauch, Chicago Tr. at 59-60.

<sup>480</sup> Elhauge, Boston Tr. at 25.

<sup>481</sup> *Id.*

<sup>482</sup> Written Submission of Peter P. Swire, Oct. 29, 2008, at 3. *See also* Swire, NY Tr. at 161-63 (recommending that the agency “go after important issues and especially focus on things that other [enforcement agencies] aren’t going to do very well” and identifying forensics and new technologies as areas in which the FTC likely has a comparative advantage over local enforcers).

<sup>483</sup> Calkins, 7/30 DC Tr. at 74. *See also* Boast, NY Tr. at 31-32 (“[T]here are . . . wonderfully unique things about the FTC and the history of the statute and the agency that allow it to deploy multiple sets of tools to the advantage of consumers.”).

<sup>484</sup> 15 U.S.C. § 45(a)(1). The basic prohibition (though initially limited to acts or practices “in commerce”) was added to the FTC Act in 1938; previously, the Commission had challenged what would now be called “consumer protection” violations as unfair methods of competition.

outweighed by countervailing benefits to consumers or to competition.”<sup>485</sup> In addition, the Commission enforces a variety of specific consumer protection statutes – for example, the Equal Credit Opportunity Act, Truth-in-Lending Act, Fair Credit Reporting Act, the Cigarette Labeling Act, the Do-Not-Call Implementation Act of 2003, the Children’s Online Privacy Protection Act, the Fair and Accurate Credit Transactions Act of 2003, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 and others<sup>486</sup> – that prohibit specifically defined trade practices and generally specify that violations are to be treated as if they were “unfair or deceptive” acts or practices under Section 5(a). The Commission enforces the substantive requirements of consumer protection law through both administrative and judicial processes.

The Commission enforces various antitrust laws, most significantly Section 5(a) of the FTC Act and provisions of the Clayton Act, through its Bureau of Competition. Section 5(a) of the FTC Act prohibits “unfair methods of competition.”<sup>487</sup> Unfair methods of competition include any conduct that would violate the Sherman Antitrust Act. The Clayton Act prohibits, among other things, corporate acquisitions that may tend substantially to lessen competition<sup>488</sup> and certain forms of price discrimination.<sup>489</sup> As with its consumer protection responsibilities, the Commission uses both administrative and judicial processes to enforce antitrust law.<sup>490</sup>

*Enforcement Goals.* In allocating resources to its law enforcement efforts, the agency should first consider the goals that underlie such efforts. As discussed in more detail in Chapter VII.B below, among the most important goals of the FTC’s law enforcement mission are providing guidance to industry, developing sound law, and obtaining consumer redress. Deterrence of unlawful conduct, however, is the lodestar of the agency’s law enforcement efforts. Former BCP Assistant Director Paul Luehr expressed the view that the FTC’s role as an enforcer – particularly since the early 1990s – “has really given the agency added heft. No longer [is it] considered just the nanny on Pennsylvania Avenue full of regulations, rules related to the frosted cocktail glass, and things like this. But now [it is seen as bringing] real cases in federal court against real wrong doers and I think that has had a real deterrent effect and many other salutary effects on the market.”<sup>491</sup> According to former BCP Deputy Director Lee Peeler, an

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<sup>485</sup> *Id.* § 45(n); FTC Policy Statement on Unfairness, Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984).

<sup>486</sup> Links to various statutes enforced by the Commission are available at [www.ftc.gov/ogc/stats.shtm](http://www.ftc.gov/ogc/stats.shtm). Some of these statutes include provisions for enforcement by other agencies; for example, the Administrator of the National Credit Union Administration can enforce the Fair Credit Reporting Act against credit unions.

<sup>487</sup> 15 U.S.C. § 45(a).

<sup>488</sup> *Id.* § 18.

<sup>489</sup> *Id.* §§ 13-13b.

<sup>490</sup> Additional information regarding the FTC’s enforcement authority is available at <http://www.ftc.gov/ogc/brfovrw.shtm>.

<sup>491</sup> Luehr, Chicago Tr. at 25-26. *See also id.* at 46-47 (“So in terms of allocation of resources, I don’t think that too much can be said about the effect of real federal cases.”).

active enforcement program provides the agency with credibility – “street cred” – when it goes to another government agency, a state, or a consumer group and advocates a certain approach to consumer protection.<sup>492</sup> Another roundtable panelist explained that “the notion of demonstrating to the bar and the business community that the cop is really on the beat is a really important part of the agency’s enforcement mission.”<sup>493</sup>

*Caseload.* An important consideration in allocating resources to law enforcement efforts is the appropriate number of cases to pursue at any given time. As former Chairman Muris has written, an agency that takes on commitments that significantly outrun its capabilities does so at its own peril:

Agencies can create a serious problem by taking on so many matters that the agency lacks the human capital to execute them well. Again the overambitious case load in the 1970s overtaxed the agenc[y’s] capabilities, thereby raising doubts about the FTC’s ability to handle the matters successfully. The Commission would have been far better off choosing a smaller number of matters and handling them well.<sup>494</sup>

Resource allocation and caseload are also considerations when requests for cooperation are received from foreign counterparts. Although it has not been a problem to date, as more and more FTC investigations and cases – for both missions – involve foreign elements, the agency as a whole may need to consider the resource implications of cooperation with foreign counterparts in investigations and litigation. In a number of instances, the investment of FTC resources on behalf of a foreign government may encourage foreign agencies to invest their resources to support FTC enforcement matters. This ingredient of reciprocity warrants attention in deciding how to allocate FTC resources.

*Case Generation.* Another consideration in evaluating the agency’s law enforcement efforts is the amount and type of case generation in which the agency

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<sup>492</sup> Peeler, 7/30 DC Tr. at 141-42.

<sup>493</sup> McDavid, 7/30 DC Tr. at 53 (“Most antitrust enforcement in this country, and I think around the world, actually doesn’t happen [at an antitrust agency] like this. It happens in my clients’ boardrooms, in the conference rooms in our law firms, where we tell the clients the risks that attach to the conduct that they are proposing . . . . And our ability to get the attention of the business people and have them take us seriously when we tell them, you are close to the line or you are over the line, is directly correlated to the things that do happen [at the agency] and in your enforcement mission.”). See also Written Submission of Tim Kennish, Sept. 26, 2008, at 6 (“[G]uidance will not, it seems to me, engender the respect it deserves if it is not supported by enforcement actions in cases where the behavior in question constitutes a clear violation of FTC enforcement policy. In essence, the agency cannot afford to shrink from putting its money where its mouth is.”); Baer, 7/29 DC Tr. at 85 (“To get companies and individuals to take seriously the impact of [the agency’s] prospective guidance, there has to be a cop on the beat and there has to be an ability to enforce and to go aggressively where somebody has overstepped the line. You really need both [guidance and enforcement].”).

<sup>494</sup> Muris, *Principles*, *supra* note 17, at 181-82.

engages. Former BC Director Richard Parker recommended that the agency be innovative in the area of case generation, citing trade press – particularly in fungible commodity industries with few sellers – and trade association bylaws as sources of potential cases.<sup>495</sup> Former BCP Assistant Director Darren Bowie argued that an approach of generating cases and seeing which ones percolate to the top is not effective. Instead, the agency fares better when everyone – including the Commission, managers, and staff – understand what the enforcement strategy is and why the agency is bringing the cases that it is bringing.<sup>496</sup>

*Case Selection.* Perhaps the most important consideration in evaluating the enforcement efforts of the FTC is its case selection. Such evaluation should consider where the agency decides to focus its enforcement efforts. For example, should that focus be where potential consumer benefits and/or redress are largest? Should the focus be on areas involving the greatest amount of commerce? How much of the agency’s enforcement efforts should be devoted to developing or clarifying competition and consumer protection doctrine? Does the agency have the right mix of high risk/high reward or cutting-edge cases, on the one hand, and low risk/low reward or traditional cases, on the other? Is the agency properly calibrating its litigation risk? How should the agency incorporate investigative and case cooperation commitments to foreign counterparts consistent with resource constraints?

External consultations confirmed the importance of focusing enforcement efforts on significant portions of the national economy, including health care, energy, and retail markets. In deploying enforcement resources, according to former BC Director William Baer, it would be reckless not to take a hard look at what is important in the economy generally, such as health care, information technology, and Internet commerce. He cautioned, however, that such a focus will not necessarily result in most of the agency’s cases being brought in those areas; rather, the agency has to go “where the money and the problems are.”<sup>497</sup> Another panelist agreed that the agency ought to focus on significant sectors of the economy; however, he added that the agency needs to “use a number of different tests and see whether the result of applying more than one leads [it] to the same conclusion.”<sup>498</sup>

Former BC Director Susan Creighton has remarked that the agency should “fish where the fish are.”<sup>499</sup> Specifically, she cited two instances of market failure in which enforcement can be the right tool. The first instance involves legal failure – that is, areas, such as the state action and *Noerr-Pennington* doctrines, in which the development of

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<sup>495</sup> See Parker, 7/29 DC Tr. at 74-75.

<sup>496</sup> See Bowie, 7/29 DC Tr. at 71-72.

<sup>497</sup> Baer, 7/29 DC Tr. at 73.

<sup>498</sup> Temple Lang, Brussels Tr. at 70.

<sup>499</sup> Muris, 7/29 DC Tr. at 42 (citing Creighton); see also Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 978 (2005) (“[W]hen fishing, the best place to fish is where the fish are plentiful, and the things you catch are likely to be fish.”).

antitrust law appears to be going in the wrong direction. The second instance is where there are no other proper plaintiffs whose interests coincide with the public interest, perhaps due to a collective-action problem.<sup>500</sup>

According to roundtable panelists, the agency also should consider focusing its law enforcement efforts in such a manner as to both leverage its resources and exploit its comparative advantages. Baer recommended that the agency select areas in which the agency can leverage its resources by, for example, serving as a model for local and state officials to emulate, with the end result being “more cops on the beat than just the FTC.”<sup>501</sup> Luehr suggested that the number of consumers injured – not just the amount of potential redress – should be taken into consideration because few entities other than the FTC can take on high-volume consumer cases.<sup>502</sup> Similarly, another panelist observed that, unlike in Europe, the U.S. has a “parallel system” of private enforcement that may provide the FTC with the opportunity to forego certain cases that may be better suited for such private enforcement.<sup>503</sup>

In addition to the more traditional leads for investigations (such as complaints or merger notifications), some foreign counterparts such as the U.K. OFT increasingly are adopting a more intelligence-led, proactive approach to case selection. The OFT has committed significant resources to idea generation, establishing a horizon scanning team to coordinate generation of new project ideas within the office, as well as a monthly project ideas group that brings together individuals from across the office responsible for researching and developing ideas for new work. All OFT investigations, independently of their source, are prioritized according to their likely impact and strategic significance, balanced against the risks and resources needed.<sup>504</sup> This prioritization framework is applied at group and area management levels with escalation to the senior management team when necessary.<sup>505</sup>

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<sup>500</sup> Creighton, 7/29 DC Tr. at 76-78.

<sup>501</sup> Baer, 7/29 DC Tr. at 74.

<sup>502</sup> Luehr, Chicago Tr. at 92-93.

<sup>503</sup> Venit, Brussels Tr. at 14. *See also* Heimler, Paris Tr. at 135 (stating that the United States is in a “privileged situation” because most cases “originate from private litigation, and I think this makes a very big difference, also, in terms of priority for the agency, in terms of cases that you take”).

<sup>504</sup> *See supra* Chapter V.B.3 for a discussion of these prioritization principles.

<sup>505</sup> Consultation with OFT, Sept. 11, 2008. Other countries prioritize by subject matter areas (*e.g.*, consumer credit, tourism and leisure, public service delivery), while others select cases based on particular industries or commercial sectors (*e.g.*, mobile commerce). Still others adopt a hybrid approach, focusing first on subject matter and then weighing various factors such as the cost of enforcement action. For example, the Canadian Competition Bureau has developed a two-step formal approach to case selection: the first step involves identifying particular sectors worthy of the Bureau’s attention; the second step involves a triage approach to identify factors that would suggest that a specific case should be opened. Factors considered include: (1) specific deterrence (*i.e.* to stop a repeat wrongdoer); (2) the need for judicial interpretation of a specific legal principle; (3) prevention or correction of conduct; (4) general deterrence; (5) awareness/promotion of compliance; (6) addressing particularly flagrant or egregious conduct; and (7) meeting the Bureau’s obligations to law enforcement partners. Consultation with Canadian Competition Bureau, Sept. 17, 2008.

Another relevant factor in selecting cases is the litigation risk attendant to pursuing any given case. In the various external consultations, there was a fairly uniform view that the agency ought to be less risk-averse in bringing cases. Parker bluntly stated that “if you weigh the risk of losing too much, you are never going to bring a case.”<sup>506</sup> Former BC Assistant Director Joseph Kattan remarked that “the function of the agency as an enforcement agency is to get the right answer. It is not to win cases for the sake of winning cases.”<sup>507</sup> Another panelist argued that, although the agency has to win “a reasonable proportion” of the cases that it brings, “you also have to recognize that at least from time to time you’re going to have to bring cases to try to establish the law where either it seems to be wrong or it isn’t sufficiently clear or you want to push the boundaries, to some extent, and . . . you can’t guarantee [that you will] win cases of that kind.”<sup>508</sup> A panelist at the Tokyo roundtable argued that the FTC would make the most of its human resources – particularly its economists – by pursuing difficult cases and not being overly concerned about winning or losing a particular case.<sup>509</sup> Bruno Lasserre, the head of the Conseil de la Concurrence, noted that a well-reasoned opinion dismissing a complaint can be as valuable in developing legal standards as an opinion that finds liability.<sup>510</sup>

Similarly, Bowie explained: “The Commission’s reputation is strong enough that it can afford to take some risks in the right cases where there is a clearly defined consumer harm that the agency can articulate and that outsiders and insiders can understand. In those cases, it is worth taking some risks and the Commission can afford to do more of that.”<sup>511</sup> Former BE Director David Scheffman characterized the agency staff as “very conservative” in bringing cases, identifying as one of the causes the fact that litigation losses tend to be felt primarily by career staff, who continue to be at the agency when adverse decisions are rendered, rather than senior staff and the Commissioners, who may have departed the agency by such time.<sup>512</sup>

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<sup>506</sup> Parker, 7/29 DC Tr. at 80.

<sup>507</sup> Kattan, 7/29 DC Tr. at 158. *See also* Campbell, Chicago Tr. at 119 (“I’m not saying [the FTC has] to litigate every case. I just think the FTC’s tradition is not to litigate enough cases and not to go to court often enough.”); Heyer, 7/30 DC Tr. at 97 (“I think that you don’t want to be in a position where every case you bring you win. That suggests maybe you’re not bringing enough. And I like the idea of pushing a bit and being in court more often. . . . I began by saying I think the agency should try to be in court more. It does have benefits, transparency, fashioning the doctrine. War is inefficient, but sometimes you do go to war.”); Boast, NY Tr. at 52-53 (“I wouldn’t be troubled by a twenty percent win ratio. . . . The losses are very important. If you’re bringing frivolous cases, of course not. But, . . . [it is] very important to know what the courts think about [the difficult cases].”); Angland, NY Tr. at 65 (“having a low winning percentage doesn’t mean you shouldn’t be bringing cases”).

<sup>508</sup> Temple Lang, Brussels Tr. at 39.

<sup>509</sup> Tokyo Roundtable, Oct. 7, 2008.

<sup>510</sup> Consultation with Conseil de la Concurrence, Oct. 23, 2008.

<sup>511</sup> Bowie, 7/29 DC Tr. at 81.

<sup>512</sup> Scheffman, NY Tr. at 51, 53.

*Fora.* The FTC is able to pursue its law enforcement mission through both administrative processes (in so-called Part III proceedings) and judicial processes (in federal district court). The agency must make a determination as to the proper forum for the various enforcement actions that it pursues, and primary considerations may be that the Commission's authority to obtain redress, disgorgement, and other equitable remedies is well established only in a judicial setting, while the agency has more opportunity to apply its expertise in an administrative setting.

*Remedies.* Another significant factor in making law enforcement decisions is the appropriate remedy that the FTC should seek in any given case; as noted above, this may be key to selecting a judicial or administrative forum.

A relevant consideration is whether the agency is using its remedial powers – including conduct, structural, and monetary remedies – properly and effectively. Several panelists commended the FTC's 1999 merger remedies study<sup>513</sup> for helping to refine the agency's pursuit of appropriate remedies.<sup>514</sup> Panelists also addressed the FTC's authority to pursue disgorgement as a remedy for antitrust violations of the FTC Act. One panelist touted the benefits of disgorgement, arguing that injunctive remedies, such as cease and desist orders, and even structural remedies, often are inefficient and ineffective; by comparison, disgorgement can take away the benefits of the unlawful conduct from its perpetrator, thereby providing much greater deterrence of those violations in a more efficient manner.<sup>515</sup> Others, including former Commissioner Thomas Leary, argued against the imposition of such "retrospective consequences in the antitrust field."<sup>516</sup>

Whatever the remedy sought in any particular matter, such remedy should be identified as early as possible in the course of the matter. If no workable remedy is possible, the agency might reconsider pursuing such matter. As one panelist framed the issue, "[It is] very important, before ever taking an individual case on, . . . to ask yourself a question[:] if I had to put a remedy in place, what would it be and will it make things better or worse? . . . [T]hat is a very important discipline to take on before one gets involved in an individual case."<sup>517</sup>

A larger consideration for the agency is whether its existing remedial powers are appropriate, given its competition and consumer missions. As one example, the FTC has very limited authority to pursue civil penalties for violations of Section 5 of the FTC Act. The Commission has testified before Congress that there are categories of cases in which "restitution or disgorgement may not be appropriate or sufficient remedies" and thus

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<sup>513</sup> 1999 DIVESTITURE STUDY, *supra* note 408.

<sup>514</sup> See, e.g., McDavid, 7/30 DC Tr. at 87; Heyer, 7/30 DC Tr. at 89.

<sup>515</sup> See Elhauge, Boston Tr. at 61-63.

<sup>516</sup> Leary, 7/29 DC Tr. at 24.

<sup>517</sup> Venit, Brussels Tr. at 14-15. See also Koponen, Brussels Tr. at 22 ("[O]n the Section 2 side of things, I think we've seen, not least here in Europe, some big question marks around remedies that have been imposed or have been considered in those types of cases.").

“civil penalties could enable the Commission to better achieve the law enforcement goal of deterrence.”<sup>518</sup>

*Settlements and Closing Statements.* The vast majority of cases pursued by the agency – much like those pursued by private parties – are settled prior to or during litigation. In addition, the agency recently has issued statements in connection with the closing of certain matters, generally discussing the reasons for not pursuing such matters. Consent decrees and closing statements are thus examined by industry and the bar for guidance as to the agency’s enforcement stance in a given area of competition or consumer protection law. Relevant considerations in this area include whether the agency is making proper use of consent orders and closing statements and, more specifically, whether the agency can provide more information and reasoning in such documents than it currently does.

Kattan explained that the public analyzes consent orders because “this is how the Commission broadcasts to the world what its enforcement priorities are. So long before there was a Rambus case, there was a Dell case[,] . . . which was a consent order, [in] which the Commission laid out a policy regarding patent ambush.”<sup>519</sup> Luehr claimed that FTC staff does not realize the extent to which companies look at final orders – bullet-by-bullet – to determine what they need to do to ensure that they are in compliance with the consumer protection laws.<sup>520</sup> Another roundtable panelist, however, questioned the value of FTC consent decrees – particularly in the merger context – characterizing them as “articles of surrender” signed by CEOs wanting to get their mergers approved and stuffed full of “exotic theories” held by the Commission.<sup>521</sup>

Roundtable panelists consistently favored the concept of issuing closing statements, describing them as “very useful,”<sup>522</sup> “excellent,”<sup>523</sup> and “one of the great innovations of the last five or six years.”<sup>524</sup> One panelist extolled the “transparency that comes from things like some of the very informative closing statements that the Federal Trade Commission pioneered a while back.” He specifically cited the statement issued in

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<sup>518</sup> *Federal Trade Commission Reauthorization: Hearing on the Federal Trade Commission Reauthorization Act of 2008 Before the S. Comm. on Commerce, Science, and Transp.*, 110th Cong. 10-11 (2008) (statement of the Federal Trade Commission), available at <http://www.ftc.gov/os/testimony/P034101reauth.pdf>.

<sup>519</sup> Kattan, 7/29 DC Tr. at 125 (citing Rambus Inc., FTC Dkt. No. 9302; Dell Computer Corp., FTC Dkt. No. C-3658). See also Harrop, Chicago Tr. at 126 (describing settlements as a “very useful” way for an agency to tell the public what its priorities are and where it thinks there are consumer harms); Bowie, 7/29 DC Tr. at 86 (“[C]ases in litigation also play a hugely important role in providing guidance to the industry, particularly when the vast majority of Commission actions are settlements.”).

<sup>520</sup> Luehr, Chicago Tr. at 45-46.

<sup>521</sup> Campbell, Chicago Tr. at 108-09. See also *id.* at 117 (questioning deterrence value of consent decrees).

<sup>522</sup> DeSanti, 7/29 DC Tr. at 147.

<sup>523</sup> Pritchard, London Tr. at 41.

<sup>524</sup> Kattan, 7/29 DC Tr. at 144.

connection with the closing of the Cruise Line matter,<sup>525</sup> saying that it was “very good because it not only informed people, . . . but it also allowed people to debate things publicly, and that is something that helps lead you towards a better answer.”<sup>526</sup> Similarly, former BC Scholar in Residence Joshua Wright observed that an agency may be more careful in its analysis of a particular matter if it anticipates issuing a closing statement in such matter.<sup>527</sup> Another panelist made the point that closing statements are particularly important in highly visible matters, observing that “part of deterrence [is] to be out there showing how [the agencies are] thinking about cases that are visible and important[,] . . . [b]ut if you’re not bringing the visible case, maybe you should explain why not.”<sup>528</sup>

There are, of course, various concerns raised by the practice of issuing closing statements and agency transparency more generally. Former BC Project Director for Intellectual Property Hillary Greene identified the following concerns: resource constraints, confidentiality, undermining agency discretion in future cases, and explaining decisions that are based on administrative considerations or that involve “mixed motives.”<sup>529</sup> A former Canadian competition official explained how he encountered significant resistance to his decision “to not only explain on the public record those cases where we were challenging but, in high profile matters, reasons why we decided in the end not to challenge the matter.” As he explained, his counterparts in the United States, in particular, warned him of potential litigation over such closing statements.<sup>530</sup>

## 2. Policy Research and Development

As discussed in more detail above in Chapter V.C, policy research and development at the FTC includes a broad array of activities designed to inform the agency’s pursuit of its competition and consumer protection missions. These activities include workshops, hearings, studies, reports, and ex post assessments of agency initiatives and actions.

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<sup>525</sup> The FTC press release announcing the closing of the Cruise Line matter, with links to statements by the Commission majority and the dissenting Commissioners, is available at [www.ftc.gov/opa/2002/10/cruiselines.htm](http://www.ftc.gov/opa/2002/10/cruiselines.htm).

<sup>526</sup> Heyer, 7/30 DC Tr. at 65. *But see, e.g.*, Levine, NY Tr. at 174-75 (recommending that the FTC include additional information and reasoning in its closing statements); Pritchard, London Tr. at 41-44 (same); Bloom, London Tr. at 168 (same).

<sup>527</sup> *See* Wright, Chicago Tr. at 130.

<sup>528</sup> Shapiro, Chicago Tr. at 264. *See also* AAI TRANSITION REPORT, *supra* note 150, at 187 (“The agencies should issue statements at the close of every prolonged or high-visibility merger investigation that results in no agency challenge. . . . These statements should be more than perfunctory, describing not only issues involving definition of markets but also additional information, such as entry and efficiencies, whether favorable or unfavorable to the agency’s decision, that was considered in determining whether or not to challenge the transaction.”).

<sup>529</sup> Greene, Boston Tr. at 77-76.

<sup>530</sup> Goldman, Ottawa Tr. at 10-11.

Consultations with various outside parties and representatives from other competition and consumer protection agencies identified significant support for the FTC's allocation of resources to its policy R&D efforts. Former Chairman Muris characterized such efforts as "part and parcel of the [agency's] mission."<sup>531</sup> Former Commissioner Leary described the policy R&D program as more than just a "support service of the Bureaus," stating that he would make the program part of the agency's core mission.<sup>532</sup> Former OPP Deputy Director Jerry Ellig, who is involved in government agency review efforts at the George Mason University Mercatus Center, offered that he tells other government agencies that they can learn from what the FTC does in the policy R&D area. He described such R&D as "a crucial input into the [FTC's] good decision-making."<sup>533</sup> Another roundtable panelist opined: "The FTC's special mission in the policy area, I think, has been extraordinarily valuable."<sup>534</sup>

In addition, the ABA Transition Report recently made the following recommendation: "The U.S. agencies should devote substantial resources to providing intellectual leadership and increasing transparency through policy research and development. . . . Although they can be resource-intensive, 'policy research and development' efforts such as empirical studies, hearings, reports, and literature surveys can play a vital role in the development of [antitrust] standards that strike the proper balance between under- and over-deterrence."<sup>535</sup>

### 3. Advocacy

As an important complement to its law enforcement mission (and as a component of its relations with other domestic agencies, as discussed in Chapter IV.C), the FTC engages in competition and consumer protection advocacy before other policymakers, including state legislatures, regulatory boards, and officials; state and federal courts; other federal agencies; and professional organizations, such as bar associations. In response to requests or where public comments are sought, the FTC issues advocacy letters, comments, and amicus briefs, providing policymakers with a framework to analyze competition and consumer protection issues raised by pending governmental actions or ongoing judicial disputes. Advocacy can play a particularly important role in addressing governmentally imposed restraints on competition, where (unless a state body acts outside the proper confines of the state action doctrine), other tools may be unavailable.<sup>536</sup>

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<sup>531</sup> Muris, 7/29 DC Tr. at 54.

<sup>532</sup> Leary, 7/29 DC Tr. at 27.

<sup>533</sup> Ellig, 7/30 DC Tr. at 42-44.

<sup>534</sup> McDavid, 7/30 DC Tr. at 54.

<sup>535</sup> ABA TRANSITION REPORT, *supra* note 11, at 46.

<sup>536</sup> See *Conversation with Muris and Pitofsky*, *supra* note 27, at 830-31 (observations by Muris about the essential need to address, by advocacy and other means, governmentally imposed restraints on competition).

External consultations confirmed the important informational purpose served by the agency’s advocacy efforts. Panelist Ken Heyer explained that “one of the reasons why regulations and laws that are harmful or anticompetitive in some way manage to flourish . . . is because the costs associated with them are not obvious to people who don’t spend their lives studying them.”<sup>537</sup> Competition advocacy, Heyer continued, helps “to illustrate the costs associated with certain types of policies. And, at that point, you have to leave things up to democracy to decide. But at least you’re clarifying and highlighting what the costs of certain [policies] are.”<sup>538</sup> Similarly, another panelist stated that advocacy letters to state legislatures are “quite useful” because often the only source of information regarding a particular bill is the advocates of such bill, including the industries that stand to benefit from the bill’s passage.<sup>539</sup>

There was strong support among those consulted for the FTC’s advocacy efforts. Several panelists expressed the view that the agency’s advocacy efforts entail both relatively low costs<sup>540</sup> and potentially significant benefits.<sup>541</sup> As a result, advocacy tends to be on net a productive use of agency resources.<sup>542</sup> Joseph Kattan described competition advocacy as “one of the more important things that the Commission does.”<sup>543</sup> Another panelist opined that, in certain situations, effective advocacy can be more successful or productive than litigation.<sup>544</sup>

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<sup>537</sup> Heyer, 7/30 DC Tr. at 75-76.

<sup>538</sup> *Id.* at 76.

<sup>539</sup> Harrop, Chicago Tr. at 160. *See also id.* at 160-61 (mentioning successful FTC advocacy efforts to prevent passage of anticompetitive state legislation affecting the real estate brokerage industry).

<sup>540</sup> *See, e.g.,* McChesney, Chicago Tr. at 155-58 (stating that in terms of resources, the demands imposed in doing competition advocacy are “fairly minimal”); Elhauge, Boston Tr. at 56 (“I would be inclined to think competition advocacy is probably some good bang for the buck in part because the cost seems relatively low of engaging in competition advocacy.”).

<sup>541</sup> *See, e.g.,* Krattenmaker, 7/30 DC Tr. at 67 (asserting that advocacy can have “potentially large pay-offs”); McDavid, 7/30 DC Tr. at 69-70 (“[T]he effect of competition advocacy can be across an entire sector. . . . I think that there is real bang for the buck in this area.”). *See also* ABA TRANSITION REPORT, *supra* note 11, at 29 (“In its 1989 Transition report, the Section noted, ‘Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the [FTC’s] entire budget.’”).

<sup>542</sup> *See, e.g.,* Carlton, Chicago Tr. at 271 (“I think you could have a tremendous value added by trying to comment on and influence other branches of government that don’t appreciate economics or economists as much as the FTC and DOJ.”); McChesney, Chicago Tr. at 154 (arguing that there is a “real comparative advantage” to having the personnel at the FTC, including both economists and attorneys, explain to other policymakers the competitive implications of their proposals).

<sup>543</sup> Kattan, 7/29 DC Tr. at 126. In its *Transition Report on Competition Policy*, the American Antitrust Institute set forth the following recommendation regarding the antitrust agencies’ advocacy efforts: “The agencies should continue to perform a policy advocacy role with Congress, state legislatures and other agencies, attempting to stop rules or laws with unintended or unacceptable anticompetitive effects from being enacted.” AAI TRANSITION REPORT, *supra* note 150, at 184.

<sup>544</sup> *See* Wilks, London Tr. at 38.

Roundtable panelists commented on the scope of, and the legal and economic theories underlying, the agency's advocacy efforts. Former OPP Director Susan DeSanti stated: "I think that because your advocacy letters do not tend to be spread out all over the place, but rather they are focused and targeted, there is a better chance that you are actually having an impact . . . especially when you do it in conjunction with workshops and the reports that then come out of the workshops."<sup>545</sup> Joshua Wright argued that, in contrast to our understanding of certain areas of antitrust law, such as monopolization, our understanding of the harmful competitive effects of certain categories of state regulation is relatively strong. As a result, the allocation of resources to competition advocacy in these areas is a "no-brainer."<sup>546</sup> Former BC Associate Director Fred McChesney stressed the importance and usefulness of having empirical data and analysis to back up the agency's advocacy efforts.<sup>547</sup>

Other panelists discussed the value of advocacy before certain policymakers. Susan Creighton asserted: "[N]obody is going to be an advocate for markets with other government agencies like this agency can be."<sup>548</sup> Another panelist recommended that the FTC "press more to have a seat at the table and to be consulted more before other areas of the government take action that is truly anti-competitive . . . ."<sup>549</sup> McChesney argued that in certain cases of regulatory capture at another agency, it is helpful to have a disinterested outsider, such as the FTC, provide input on proposed regulations.<sup>550</sup> Former BC advisor Thomas Krattenmaker acknowledged, however, that there may be "a real political risk" in undertaking advocacy – particularly in front of other federal agencies.<sup>551</sup> This potential concern stands in sharp contrast with the situation in South Korea, where all government agencies wishing to implement a program or activity are obliged to submit the program or activity first to the Korean Fair Trade Commission ("KFTC") for review based on competition considerations.<sup>552</sup> Another panelist stressed the importance of FTC advocacy before Congress. Specifically, the agency ought to reiterate to Congress that competition works and should not be supplanted by antitrust

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<sup>545</sup> DeSanti, 7/29 DC Tr. at 152.

<sup>546</sup> Wright, Chicago Tr. at 161-63.

<sup>547</sup> See McChesney, Chicago Tr. at 197.

<sup>548</sup> Creighton, 7/29 DC Tr. at 76-77.

<sup>549</sup> Fox, NY Tr. at 96.

<sup>550</sup> See McChesney, Chicago Tr. at 164.

<sup>551</sup> Krattenmaker, 7/30 DC Tr. at 68.

<sup>552</sup> Agencies are required by statute to consult the KFTC, but they are not required to implement the KFTC advice. Consultation with Korean Fair Trade Commission, Sept. 4, 2008. In Mexico, the government and regulatory agencies are required to consult with the Federal Competition Commission on draft legislation and regulations that affect competition, and if the agency offers formal advice, to follow it. Mex. L. Fed. Econ. Competition, Art. 24, §§ 6-7. Similarly, a Paris roundtable panelist contrasted the role of the FTC (and DOJ) with that of the Competition Commissioner in the European Union, who "is part of the cabinet and is involved and has some kind of say in every political decision that's made in the EU about transport, energy, communications, et cetera[,] . . . rather than being some kind of outside advocate in a slightly remote agency, perhaps, who after the decisions have been made gets some sort of right to make a submission." Fels, Paris Tr. at 18-19.

exemptions.<sup>553</sup> A panelist at the Tokyo roundtable recommended that the FTC and DOJ advocate the importance of competition before the U.S. International Trade Commission.<sup>554</sup>

External consultations yielded several recommendations for the agency to consider in the advocacy area. At least one roundtable panelist recommended increased advocacy efforts by the FTC, explaining that “there is enormous value in expanding the competition advocacy program.”<sup>555</sup> Krattenmaker offered the following advice: “I would like to see in the competition advocacy work more extensive and rigorous economic work being done right alongside the legal.”<sup>556</sup> One panelist recommended the building of lines of communications between the antitrust agencies and other federal agencies involved in economic decision making but that do not have the economic staff that the FTC and DOJ do.<sup>557</sup> Another panelist suggested that the FTC reconsider its invitation-only approach to advocacy, by which it typically issues advocacies only in response to invitations by other policymakers.<sup>558</sup> Finally, a Canadian government official recommended that a greater proportion of the FTC’s advocacy efforts be conducted in the agency’s own name, as opposed to speeches and statements by individual officials which are disclaimed as representing only their own views.<sup>559</sup>

#### **4. Rulemaking**

Returning to questions of enforcement, the Commission’s strongest policymaking tool, in addition to litigation, is rulemaking. Through rulemaking under the FTC Act, the Commission can prohibit or mandate actions to remedy unfair or deceptive acts or practices; through rulemaking under certain other consumer protection laws, it can prohibit or mandate actions to address other proscribed conduct. Further, similar to its authority to seek civil penalties for violations of orders entered through administrative litigation (or settlements in lieu of such litigation), the Commission has had broad

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<sup>553</sup> McDavid, 7/30 DC Tr. at 70 (addressing then-current legislation creating an antitrust exemption to allow retailers to bargain collectively with credit card issuers). *See also* Venit, Brussels Tr. at 30 (recommending that the FTC direct its advocacy efforts toward Congress to educate lawmakers on the complexities of the competition problems with which the FTC regularly deals); Crampton, Ottawa Tr. at 5 (recommending that the competition authorities “reach out to . . . people who are in a position to pass laws and pass very bad laws and do some real damage to our antitrust laws, to build a bridge to that community so that their ears are open when you then speak, and try to get them to better understand how markets work and what the consequences of their actions might be”).

<sup>554</sup> Tokyo Roundtable, Oct. 7, 2008.

<sup>555</sup> Langer, Boston Tr. at 51-56 (complimenting the FTC’s advocacy efforts “to ward off the most egregious anticompetitive behavior at state and local levels either in terms of legislation or some type of regulatory action”).

<sup>556</sup> Krattenmaker, 7/30 DC Tr. at 69.

<sup>557</sup> *See* Carlton, Chicago Tr. at 272.

<sup>558</sup> *See* Elhauge, Boston Tr. at 56.

<sup>559</sup> Consultation with Canadian Competition Bureau, Sept. 17, 2008.

authority, since 1975, to obtain civil penalties for violations of rules issued under the FTC Act and many special statutes.<sup>560</sup>

The Commission's use of rulemaking has undergone significant changes through the course of agency history.<sup>561</sup> From its early years until the 1960s, the Commission adopted a series of interpretive or advisory rules, known as Trade Practice Rules ("TPRs"). These were formulated through procedures known as trade practice conferences, initiated by members of an industry, authorized by the Commission, and presided over by a Commissioner. Typically, each TPR addressed in detail the products and practices of a particular industry, in effect setting standards for that industry. TPRs were an effort to achieve compliance with the FTC Act by having industry members agree to eliminate specific practices considered to be unfair methods of competition. Rules that were approved by the Commission included Group I rules, which constituted a statement of intent by the Commission as to its interpretation of the FTC Act with regard to those industry practices.<sup>562</sup> Most TPRs were rescinded by the 1970s.<sup>563</sup>

During the 1960s, the Commission began to exercise its rulemaking authority pursuant to Section 6(g) of the FTC Act.<sup>564</sup> These Trade Regulation Rules ("TRRs"), as they came to be known, could be relied upon in an adjudicative proceeding to establish that a practice was unfair or deceptive, thus removing this element from the complaint counsel's burden of proof. Between 1963 and 1975, the Commission adopted more than 20 TRRs. Each addressed a discrete problem within a particular industry or service sector, often by requiring the disclosure of information to the consumer. The majority of these TRRs became outdated and ultimately were repealed, a result of the Commission's ongoing program of regulatory review and reform.

In 1975, Congress granted the Commission express authority to issue substantive rules, which included the ability to bring enforcement actions in federal court and to seek civil penalties up to \$10,000 per violation.<sup>565</sup> Magnuson-Moss rulemaking, as this authority is known, requires more complex procedures than those needed for rulemaking

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<sup>560</sup> See 15 U.S.C. § 45(m)(1) (providing for civil penalties for rule and order violations).

<sup>561</sup> See generally Lydia B. Parnes & Carol J. Jennings, *Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 989 (1997).

<sup>562</sup> Other rules (designated as Group II rules) were "received" by the Commission as expressions of the trade. See FTC, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1934, at 93-98 (1934), available at <http://www.ftc.gov/os/annualreports/ar1934.pdf>.

<sup>563</sup> Some TPRs were replaced by industry guides, which are discussed in more detail in the following section.

<sup>564</sup> 15 U.S.C. § 46(g).

<sup>565</sup> Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 57a-b). The remaining Section 6(g) TRRs were grandfathered in to the Commission's new civil penalty authority. See 15 U.S.C. § 45(m)(1)(A). The civil penalty amount subsequently was increased to \$11,000 per violation pursuant to the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 62 Stat. 974 (1996) (codified at 28 U.S.C. § 2461).

pursuant to the Administrative Procedure Act (“APA”),<sup>566</sup> including two notices of proposed rulemaking, prior notification to Congress, opportunity for an informal hearing, and, if issues of material fact are in dispute, cross-examination of witnesses and rebuttal submissions by interested persons. A number of rulemaking proceedings were undertaken in the late 1970s as a result of this new grant of authority; only a few of them, however, ultimately resulted in a rule.

During the past 15 years, 17 rules have been promulgated by the Commission, and several existing rules have been amended. In addition, three new rulemaking proceedings are in progress. Most new rules have been enacted based on specific statutes that authorized the use of APA rulemaking procedures. Many of these rules have been a response to issues generated by new electronic forms of consumer sales transactions – first telemarketing and later Internet sales – and by the personal information privacy issues that inevitably attend electronic marketing. One of the most important and successful Commission rulemakings in the agency’s history established the Do Not Call Registry,<sup>567</sup> whereby consumers can protect their privacy by electing not to receive commercial telemarketing calls. Since the Registry was opened in 2003, approximately 177 million telephone numbers have been registered, and compliance with the rule has been high.

Rulemaking proceedings since the early 1990s often have used an innovative procedure known as the public workshop conference. Such conferences bring together representatives of those who have a stake in the outcome of the proceeding, including affected industries, consumer advocates, and other federal or state government agencies. Moderated by a facilitator, the conferences enable roundtable discussion of the issues without the formality of an administrative hearing. The discussion is transcribed and provides a useful supplement to the written record of comments.

While one significant question about rulemaking is when the agency should adopt a rule, an equally important question may be whether it should retain or modify a rule. During the past 15 years, the Commission has made regulatory review and reform a high priority. Recognizing that over time some rules and industry guides may become obsolete or unnecessary or simply need updating in light of new technologies and marketing techniques, the FTC initiated a program to review its rules and guides at least once every 10 years. As a result of this systematic review, more than 50 percent of the Trade Regulation Rules (*i.e.* those not mandated by statute) and guides have been rescinded. Many of the rules and guides retained have undergone revision to streamline or update them.

External consultations addressed the agency’s rulemaking efforts. A roundtable panelist explained a potential perception problem associated with those efforts. According to the panelist, many outsiders do not understand the rulemaking process and requirements and thus expect the agency to issue rules very quickly. Others understand

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<sup>566</sup> 5 U.S.C. § 551.

<sup>567</sup> *See* 16 C.F.R. § 310.4(b)(iii)(B).

the process, but believe that the FTC has failed to work with Congress in a more collaborative manner to try to address some of the constraints on the agency's ability to be more aggressive in the consumer protection area. This, according to the panelist, can lead to a perception of unresponsiveness on the part of the agency.<sup>568</sup>

Panelists offered conflicting views regarding the agency's use of rulemaking. Two former BCP senior staff members, Jodie Bernstein and Teresa Schwartz, commented that the agency should make greater use of its rulemaking authority.<sup>569</sup> Schwartz explained that, although the agency got into "trouble" during the late 1970s for engaging in rulemakings on particular matters, such as advertising to children, the agency today should be more willing to consider rulemaking because it is an effective means of enforcement and the agency has a good process in place to gather stakeholder input on proposed rules.<sup>570</sup> Another former BCP staff member, however, argued that the FTC should wait for Congress to give the agency specific authority to issue rules in a given area because that approach not only provides political cover for the agency, it also results in "clearer direction" to the agency's audience.<sup>571</sup> In addition, Jerry Cerasale cautioned that rulemaking should be "a last resort" that is pursued only after other ways to address the problem at issue, such as self-regulation, are exhausted.<sup>572</sup>

Roundtable panelists also made specific recommendations for future rulemaking by the FTC. Data security, for example, was identified as one area in which the agency should consider rulemaking.<sup>573</sup> Two panelists, including a former BCP Director, suggested that the agency consider doing rulemaking not just in the consumer protection area, but in the competition area as well.<sup>574</sup> In addition, panelists confirmed the importance of periodically reviewing the agency's rules and updating them to ensure that they take into account developments in the marketplace, such as new technology.<sup>575</sup>

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<sup>568</sup> See A. Schwartz, 7/29 DC Tr. at 180. Schwartz did offer praise regarding the CAN-SPAM rulemaking: "I hear very little complaints in general from the industry or consumer groups about the decisions that were made. Either people did not like CAN-SPAM or liked CAN-SPAM, but there were very little complaints about how the rules came out." *Id.* at 205.

<sup>569</sup> See Bernstein, 7/29 DC Tr. at 52-53; T. Schwartz, Chicago Tr. at 68-69.

<sup>570</sup> T. Schwartz, Chicago Tr. at 68-69. See also Feigenbaum, NY Tr. at 185-86 (recommending additional FTC rulemaking – particularly in the deceptive advertising area).

<sup>571</sup> Luehr, Chicago Tr. at 66-67.

<sup>572</sup> Cerasale, NY Tr. at 177-78.

<sup>573</sup> See Luehr, Chicago Tr. at 98-99 (stating that, given the multiplicity of state laws addressing responses to data breaches and the relatively ambiguous standard of "commercial reasonability" in the FTC's consent orders in this area, additional guidance in the form of rules may be useful).

<sup>574</sup> See Bernstein, 7/29 DC Tr. at 53 ("[T]here are areas in both bureaus where there are opportunities for the use of rule-making."); Elhauge, Boston Tr. at 25-26. *But see* Greene, Boston Tr. at 38-39 (raising the question of whether the agency has statutory authority to do rulemaking in the competition area).

<sup>575</sup> See, e.g., Luehr, Chicago Tr. at 67-68. See also Cerasale, NY Tr. at 159-60 (commending the agency for holding workshops and undertaking other information gathering efforts to better understand changes in technology prior to issuing new regulations).

## 5. Guidelines, Guides, and Advisory Opinions

In proposing a trade commission in January 1914, President Woodrow Wilson emphasized the guidance the Commission could provide to business: “And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definitive guidance and information which can be supplied by an administrative body, an interstate trade commission.”<sup>576</sup> Consistent with Wilson’s intent, the Commission’s tools include guidelines, guides, and advisory opinions. Though none has the same force of law as a rule or order, all of these alert businesses to the legal standards the Commission intends to apply, or the modes of analysis that it intends to use, in analyzing possible law violations.

*Guidelines.* To promote transparency and encourage compliance with the law, the FTC issues guidelines, typically in conjunction with the Department of Justice Antitrust Division, to provide guidance regarding the application of the U.S. antitrust laws. These guidelines explain competition policy in specific areas, such as horizontal merger review,<sup>577</sup> collaborations among competitors,<sup>578</sup> licensing of intellectual property,<sup>579</sup> and health care.<sup>580</sup> In the merger context, the agencies took the additional step of issuing commentary on their merger guidelines, providing examples of the application of the guidelines in specific matters.<sup>581</sup>

During external consultations, Hillary Greene succinctly identified the various purposes and audiences served by such guidelines: “Their express purpose is obviously to explain the reasoning and analysis underlying the agency’s exercise of the [its] prosecutorial discretion.” For such purpose, the audiences of the guidelines include the agency staff, as well as businesses and their counselors. The “implicit purpose” of guidelines is “to provide a commentary on the law, to be a sort of an ongoing editorial . . . on gaps and ambiguities in the law.” For such purpose, the intended audience is the courts.<sup>582</sup>

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<sup>576</sup> H.R. DOC. NO. 625, 63d Cong., 2d Sess., at 6 (1914).

<sup>577</sup> See FTC & U.S. DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES (rev. 1997), available at <http://www.ftc.gov/bc/docs/hmg080617.pdf>.

<sup>578</sup> See FTC & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>579</sup> See FTC & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), available at <http://www.ftc.gov/bc/0558.pdf>.

<sup>580</sup> See FTC & U.S. DEP’T OF JUSTICE, STATEMENTS OF ENFORCEMENT POLICY IN HEALTH CARE (1996), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf>.

<sup>581</sup> See FTC & U.S. DEP’T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

<sup>582</sup> Greene, Boston Tr. at 17-18. See also Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 ANTITRUST L.J. 1039 (2005) (recounting the FTC’s historical approaches to antitrust guidelines).

Roundtable panelists expressed many differing opinions on the value of agency guidelines. Several panelists questioned the usefulness of such guidelines, citing the fact that there are other forces, such as private plaintiffs and foreign antitrust agencies, that will counter or even overwhelm the influence of the agency issuing the guidelines.<sup>583</sup> Another failing of guidelines cited by panelists is the “bland and relatively uninformative” nature of the final product that is made public. The perception is that, in an attempt to compromise, guidelines can strike a middle ground without clarifying doctrine.<sup>584</sup> Yet another issue is the perception that in issuing guidelines the agency is concerned about “every last possible contingency” and what some party might be able to cite against the agency at some point in the future.<sup>585</sup> Several panelists raised the legitimate concern that any agency guidelines could be subsequently used against the agency – particularly in litigation.<sup>586</sup>

Notwithstanding disagreements with specific guidelines or provisions of guidelines, panelists maintained that “guidelines are an exercise in agency transparency,”<sup>587</sup> and the “appetite of the private bar for guidance[ and] guidelines is inexhaustible.”<sup>588</sup> Many expressed generally favorable reviews of the FTC and DOJ horizontal merger guidelines. Given the dearth of Supreme Court and other case law in the merger area, the merger guidelines are viewed as necessary to provide interested parties with information regarding the agencies’ merger review process.<sup>589</sup> As one panelist explained, “Merger law . . . is at best opaque and maybe completely and totally incomprehensible. . . . [I]f you can avoid the coin flip that you often get in the district court and figure out ahead of time what the likely result of the enforcement agency is, you’re way ahead of the game.”<sup>590</sup> Hillary Greene noted that the Herfindahl-Hirschman

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<sup>583</sup> See Kattan, 7/29 DC Tr. at 146 (“[U]nless they can influence policy outside the FTC in a profound way – and that is a very difficult thing to do – it strikes me as an exercise in futility.”); DeSanti, 7/29 DC Tr. at 148 (“[I]t is not like businesses are going to only look at what the FTC has to say.”).

<sup>584</sup> See DeSanti, 7/29 DC Tr. at 146-47 (“[T]oo many times they end up being bland and relatively uninformative. No matter what people’s intentions were at the beginning to actually clarify things, inevitably disagreements arise and you go towards the middle rather than actually make progress in clarifying things.”).

<sup>585</sup> See Kattan, 7/29 DC Tr. at 158-59.

<sup>586</sup> See Greene, Boston Tr. at 32-33 (identifying the concern that guidelines will be used against the agency in court, with judges giving the guidelines “undue deference”); Elhauge, Boston Tr. at 37 (echoing concern that the courts will use guidelines against an agency, for example, by assuming that that which is not prohibited in the guidelines should be allowed); Harrop, Chicago Tr. at 140-41 (arguing that a potential danger of issuing guidelines is the prospect of having defendants and even judges turning the guidelines into a kind of checklist, each step of which the agency must satisfy, even if it is not analytically meaningful to do so).

<sup>587</sup> Campbell, Chicago Tr. at 143.

<sup>588</sup> Fenton, 7/29 DC Tr. at 220.

<sup>589</sup> See DeSanti, 7/29 DC Tr. at 147; Campbell, Chicago Tr. at 143.

<sup>590</sup> Harrop, Chicago Tr. at 137-38. See also McDavid, 7/30 DC Tr. at 81-82 (“The framework that was established by the merger guidelines is applied almost universally today.”) (arguing that any specific

Index had been presented to courts before it was incorporated into the 1982 merger guidelines, but received a hostile reception until the guidelines were issued.<sup>591</sup> Along with the publication of merger data,<sup>592</sup> the guidelines are a valuable source of transparency to the outside world.

Other guidelines received praise for various reasons. The agencies' IP licensing guidelines received praise from those generally critical of guidelines based on their inclusion of new thinking not yet reflected in the case law at the time of their issuance.<sup>593</sup> The health care statements, according to a former state enforcer, "provided enormous value to those of us who were advising our clients regarding the enforcement intentions of the agencies and had a spill-over effect upon the states in terms of what they were likely to do."<sup>594</sup> According to Stephen Calkins, the process of writing the competitor collaboration guidelines helped the agency respond to the *California Dental*<sup>595</sup> decision and helped contribute to the ongoing discussion about how to evaluate competitor collaborations. "This was an area where the agency was going to be bringing cases and, so, it did matter."<sup>596</sup>

A central issue involving agency guidelines is one of timing – including the appropriate times at which to issue and, if necessary, update any given set of guidelines. Greene identified the "central tension" in formulating guidelines as follows: waiting until there is a sufficient consensus in any particular area of the law, on the one hand, and providing certainty and guidance in such area of the law, on the other hand.<sup>597</sup> Several panelists argued that guidelines are more valuable if there is a "strong consensus" in the area of the law addressed by the guidelines.<sup>598</sup> Others argued that an agency should not

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failings within the guidelines – for example, the lack of discussion of potential competition and vertical mergers – do not "undercut the value of the fundamental structure for thinking about how one analyzes a merger").

<sup>591</sup> Greene, Boston Tr. at 20.

<sup>592</sup> Panelists expressed strong support for the agencies' publication of merger review data as having "greatly enriched our understanding of what the agencies are actually doing and then greatly enriched the discussion about what the agencies ought to do." Calkins, 7/30 DC Tr. at 86. See also McDavid, 7/30 DC Tr. at 86 ("And those merger data are incredibly useful in walking a business person through the likelihood that their particular merger will or will not be challenged.").

<sup>593</sup> See DeSanti, 7/29 DC Tr. at 147.

<sup>594</sup> Langer, Boston Tr. at 34.

<sup>595</sup> Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

<sup>596</sup> Calkins, 7/30 DC Tr. at 84.

<sup>597</sup> Greene, Boston Tr. at 31.

<sup>598</sup> See, e.g., Heyer, 7/30 DC Tr. at 79-80 ("I think there's a stronger consensus behind horizontal merger policy, for example, and I think the guidelines there have been of value . . . . To my mind, issuing guidelines on things like vertical mergers and . . . Section 2, which none of us fully understand anyway, have only limited value. I think an understanding of those things needs to sort itself out better through academic work and through research that folks do internally and through proceedings in courts before we even think of issuing guidelines there."); Wright, Chicago Tr. at 146 (arguing that a first principle of articulating guidelines should be a certain level of consensus regarding the competitive effects of the practice at issue); Harrop, Chicago Tr. at 147 (agreeing that agencies should not issue guidelines absent a

wait until there is consensus; otherwise, the guidelines will not achieve their primary goal of providing guidance.<sup>599</sup>

Similarly, the proper timing of any necessary updating of guidelines is an issue that agencies must consider carefully. As Greene explained, at some point, there exists a lag between a given set of guidelines and the agency's current thinking on the subject of such guidelines. It is a "very difficult balance" to know when that lag is sufficient to justify an updating of the guidelines. "And we've seen instances in the past in which the gap between reality and the guidelines is [such] that the guidelines . . . should actually be abandoned."<sup>600</sup> Participants in the Tokyo roundtable recommended that the agencies revise their competitor collaboration and international guidelines. More specifically, it was suggested that the agencies expand the collaboration guidelines to include additional examples of their application and to broaden them to apply to conduct among competitors that transcends joint ventures.<sup>601</sup> Another panelist recommended that the agencies update their international guidelines to reflect the increased number of countries with competition laws, as well as the increasingly important roles of multinational organizations such as the ICN.<sup>602</sup> Susan Creighton also cautioned against updating guidelines via specific enforcement actions, explaining that a more systematic approach is desirable.<sup>603</sup>

External consultations yielded several suggestions regarding potential FTC guidelines. Among the subject areas in which the agency was advised to issue or revise guidelines are: clinical integration,<sup>604</sup> vertical mergers,<sup>605</sup> mergers involving intellectual property,<sup>606</sup> monopolization,<sup>607</sup> interlocking directorates,<sup>608</sup> resale price maintenance,<sup>609</sup> and "topics that are unique to the FTC," such as unilateral conduct that is not necessarily a Section 2 violation.<sup>610</sup> Finally, Greene suggested that, "because the guidelines are so

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significant amount of experience in a given area); Drauz, Brussels Tr. at 12-13 ("I think you should never make a guideline before you have really sufficiently looked at individual cases.") (noting that a reason why it took so long for the European Commission to issue Article 82 guidance was the lack of a sufficient number of "valuable precedents").

<sup>599</sup> See, e.g., Elhauge, Boston Tr. at 37.

<sup>600</sup> Greene, Boston Tr. at 19-20.

<sup>601</sup> Tokyo Roundtable, Oct. 7, 2008. Another participant at the Tokyo Roundtable asked the FTC to clarify what kinds of conduct or practices fall under unfair methods of competition. *Id.*

<sup>602</sup> *Id.*

<sup>603</sup> See Creighton, 7/29 DC Tr. at 88-89.

<sup>604</sup> See Campbell, Chicago Tr. at 142.

<sup>605</sup> See Valentine, London Tr. at 116-17.

<sup>606</sup> See *id.*

<sup>607</sup> See *id.*

<sup>608</sup> See Fenton, 7/29 DC Tr. at 221.

<sup>609</sup> Tokyo Roundtable, Oct. 7, 2008.

<sup>610</sup> See Elhauge, Boston Tr. at 26.

clearly geared towards framing the terms of the debate and influencing courts among others,” it would be beneficial for agencies to identify and clarify within guidelines where they diverge from existing law.<sup>611</sup>

*Guides.* With the rescission of most Trade Practice Rules in the 1970s,<sup>612</sup> industry guides, which are published in the Code of Federal Regulations, or C.F.R., became a vehicle to inform businesses how the Commission would apply Section 5 of the FTC Act in specific situations. Industry guides are advisory in nature – that is, they are not an independent basis for enforcement actions, and violations do not give rise to civil penalties. However, they serve to inform businesses about practices that could be considered unfair or deceptive. Industry guides typically focus on particular problematic practices in advertising, marketing, or labeling. Promulgation of guides does not require formal rulemaking proceedings, but, in recent years, the Commission has solicited public comments, and may hold a hearing or workshop, before adopting or substantively amending guides. Like rules, industry guides are subject to review every 10 years.

The agency’s “Green Guides,” for example, are an important illustration of the use of industry guides to give advice to businesses making certain types of marketing claims. Issued in 1992 and updated in 1996 and 1998, the *Guides for the Use of Environmental Marketing Claims*<sup>613</sup> serve to help marketers avoid making environmental claims that are unfair or deceptive under Section 5 of the FTC Act. The Green Guides are currently under review, and the agency has both requested comments and conducted a series of public meetings to discuss various green marketing issues.<sup>614</sup>

Concerns were expressed by some roundtable panelists regarding the length of time involved in the review of some guides. One participant noted the need for greater transparency in connection with these reviews, suggesting that the Commission publicly announce its next steps in the process or even an approximate time frame for completion of the review.<sup>615</sup> Others stressed the importance of rescinding guides that the agency considers no longer relevant.<sup>616</sup>

*Advisory Opinions.* The FTC’s efforts at providing guidance to industry also include advisory opinions concerning proposed conduct provided in response to requests for advice. On the competition side, BC staff render so-called advisory opinions, which often involve issues in the health care field. On the consumer protection side, BCP staff

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<sup>611</sup> Greene, Boston Tr. at 76-77.

<sup>612</sup> See discussion *supra* Chapter VI.B.4.

<sup>613</sup> See 16 C.F.R. § 260.

<sup>614</sup> Additional information regarding this review of the Green Guides is available at [http://www.ftc.gov/bcp/edu/microsites/energy/about\\_guides.shtml](http://www.ftc.gov/bcp/edu/microsites/energy/about_guides.shtml). See also Creighton, 7/29 DC Tr. at 88 (noting the value of the Green Guides review process to businesses in that market); Greenbaum, NY Tr. at 184 (same).

<sup>615</sup> See Greenbaum, NY Tr. at 183-85.

<sup>616</sup> See Levine, NY Tr. at 170-72.

render so-called staff opinion letters, which typically address proposed interpretations of FTC rules and regulations. Commission advisory opinions, which are issued relatively infrequently, are intended to address substantial or novel questions of fact or law or subjects of significant interest.<sup>617</sup>

The subject of advisory opinions did not garner as much attention during the external consultations as the subject of guidelines. However, roundtable panelists did express support for the agency's efforts at issuing such opinions. According to one panelist, advisory opinion letters, much like safe harbors in guidelines, are valuable in that they provide industry with "some confidence" regarding proposed business arrangements or courses of conduct – particularly those that require confidence in their legality to succeed in the first instance.<sup>618</sup>

Several panelists, however, called for the Commission – rather than staff – to issue more advisory opinions. Stephen Calkins recommended that the Commission issue more formal advisory opinions, explaining that, although staff advisory letters can be useful in narrow areas in trying to understand "hopeless" laws, such as the Fair Credit Reporting Act, an advisory opinion from the Commission is extremely valuable because it entails a discussion and consensus reaching among the Commissioners. Thus, according to Calkins, the agency should establish a system for providing more "collective, official Commission advice" in the form of formal advisory opinions.<sup>619</sup> Other panelists remarked that the general public likely does not appreciate the fact that advisory opinions typically come from staff and are not issued by the Commission.<sup>620</sup>

## 6. Consumer and Business Education

Like guidelines, guides, and advisory opinions, business education is yet another way to facilitate compliance with the law by firms that want to comply with the law. Consumer education is a way to alert consumers to their rights and help them avoid harm, including harms from fraudulent operations with little interest in complying with the law.

During the past 20 years, educating consumers and businesses about their rights and responsibilities in the marketplace has become an increasingly important part of fulfilling the agency's consumer protection mission. Enforcement efforts to combat fraud

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<sup>617</sup> See generally 16 C.F.R. § 1.3.

<sup>618</sup> See Picker, Chicago Tr. at 145 (citing example of patent pools). See also Langer, Boston Tr. at 35 (stating that advisory opinions have been valuable in providing businesses with certainty regarding their proposed courses of conduct). The Commission does reserve the right to revisit any advice, see 16 C.F.R. § 1.3(c), although, where the Commission itself gave the advice, the rules provide assurance that "[t]he Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval." *Id.* § 1.3(b).

<sup>619</sup> See Calkins, 7/30 DC Tr. at 85. See also DeSanti, 7/29 DC Tr. at 149 (recommending that the Commission issue an advisory opinion regarding clinical integration).

<sup>620</sup> See Salinger, 7/29 DC Tr. at 148-49; DeSanti, 7/29 DC Tr. at 149-50.

are enhanced by informing consumers how to recognize and avoid becoming victims of fraudulent marketing practices.<sup>621</sup> For example, educating consumers not to respond to emails that “phish” for financial account information can be a more effective tool to combat this practice than bringing successive enforcement actions against numerous perpetrators. The Commission also integrates enforcement with consumer and business education. Law enforcement actions often are partnered with an education component that is announced at the same time and, when the Commission works with other enforcement agencies on a sweep, the Commission also works with its law enforcement partners to develop the educational component. Information for consumers might include how to recognize, avoid, and report a similar scam; for businesses, it might include how to avoid running afoul of the law.

Educating businesses about their legal obligations under a variety of FTC rules enhances compliance, and to that end, the Commission issues clear, plain-language guides – in print and on video – that pose numerous examples of required or prohibited conduct. For example, when the dietary supplement industry began to grow and advertise heavily as a result of new legislation (the Dietary Supplements Health and Education Act of 1994), industry representatives requested and received specific FTC guidance regarding substantiation for advertising claims.<sup>622</sup>

The Commission’s increased recognition of the importance of consumer and business education has resulted in the transformation – within the Bureau of Consumer Protection – of a small office to a Division of Consumer and Business Education (“DCBE”) with a staff of 19. DCBE plans and implements public education campaigns for consumers and industry through communications and outreach programs that involve the use of print, broadcast, and electronic media, special events, and partnerships with other government agencies, consumer groups, industry and professional associations, businesses, and other organizations.

More recently, the Bureau of Competition has initiated consumer education campaigns designed to inform consumers about the value of competition and the antitrust laws generally. Issued in March 2007, the publication *Competition Counts* informs consumers about the benefits of competitive markets, including lower prices, higher quality, and greater choice of goods and services. BC’s *Guide to the Antitrust Laws* contains an in-depth discussion of competition issues for those with questions concerning the antitrust laws.<sup>623</sup>

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<sup>621</sup> See *Conversation with Muris and Pitofsky*, *supra* note 27, at 778 (Pitofsky describing how, in the area of misleading health and safety claims, the FTC “combined law enforcement with a multifaceted education program – including brochures, special Web sites, public service announcements, news articles, and bookmarks – to give consumers the basic information they need to make sound decisions and to protect themselves from misleading marketing practices”).

<sup>622</sup> See Bernstein, 7/29 DC Tr. at 17-18.

<sup>623</sup> These competition guides are available at <http://www.ftc.gov/bc/guidance.shtm>.

External consultations yielded widespread expressions of support for the agency’s consumer and business education efforts in the consumer protection area.<sup>624</sup> Several roundtable panelists agreed that such efforts can be more effective than enforcement actions.<sup>625</sup> In order to maximize the impact of such efforts, however, it is important to convey consumer education messages to outside entities that are in turn able to amplify such messages to a wider audience. Lee Peeler, former BCP Deputy Director and current President and CEO of the National Advertising Review Council, stressed the importance of amplifying the agency’s consumer and business education messages by, for example, reaching out to consumer groups and self-regulatory organizations, respectively, and having those entities spread the messages to their constituencies.<sup>626</sup>

Panelists also offered several recommendations regarding the agency’s education efforts on the consumer protection side. One panelist identified two issues that the agency should take into account in preparing consumer education materials. First, according to the panelist, the types of media to which consumers will be most responsive going forward are not necessarily going to be text-based, as they have been in the past. As a result, consumer education should be delivered via video and audio, as well as text.<sup>627</sup> Second, the panelist recommended that the agency’s education efforts take into account the latest learnings from the area of behavioral economics in determining which mechanisms are most useful in changing consumer behavior.<sup>628</sup> Another panelist suggested that business education be targeted at small businesses, which may be less sophisticated and unable to hire legal counsel to help oversee their compliance efforts.<sup>629</sup>

At the U.K. consultations, some consumer representatives recommended consumer education efforts that are targeted and provide information to consumers at the time they need it. The consumer representatives further noted that much consumer education does not work for consumers because “people don’t go out seeking information until things go wrong, and businesses don’t like to talk about things going wrong.” They

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<sup>624</sup> *See, e.g.*, DeSanti, 7/29 DC Tr. at 162 (remarking that, on the consumer protection side, the FTC has “really made its mark” in the area of consumer education); Marsden, London Tr. at 120 (stressing the importance of the consumer education initiatives that the FTC and other agencies pursue to “reach out and try to have an impact directly and explain their messaging”).

<sup>625</sup> *See, e.g.*, Peeler, 7/30 DC Tr. at 195 (citing in particular the area of phishing, where the agency has tried to change consumer behavior, not just bring cases against phishers); Wilks, London Tr. at 38 (noting that consumer education can have more of a “societal impact” than individual law enforcement actions).

<sup>626</sup> *See* Peeler, 7/30 DC Tr. at 194-95.

<sup>627</sup> *See* Swire, NY Tr. at 197-98. *See also* Brendler, NY Tr. at 236-38 (touting video on phishing and auction scams created by Consumer Reports WebWatch and noting that younger consumers increasingly want their news or information to “come through organic means,” such as through social networking sites, games, and mobile phones); DeMarrais, NY Tr. at 276 (recommending that the FTC consider repackaging its existing education materials in such a way as “to reach high school students, who are uneducated on consumer issues”).

<sup>628</sup> *See* Swire, NY Tr. at 197-98.

<sup>629</sup> *See* Cerasale, NY Tr. at 201-02.

suggested that insights into consumer behavior, through social marketing and behavioral economics, might assist in developing new types of consumer education.<sup>630</sup>

Panelists disagreed as to the proper role of FTC consumer education on the competition side. Susan DeSanti recommended that the agency consider how it might better convey to its various constituencies the value of competition, which may not be well understood. “If there is an agency that has a mandate that would include education on that subject, it is this agency.”<sup>631</sup> Others, including former BE Director Michael Salinger, however, raised concerns regarding the agency’s expenditure of scarce resources on such efforts, suggesting that the agency “think about getting others to do this for the Commission rather than having the Commission devote a lot of resources to it.”<sup>632</sup>

## **7. Encouragement of Appropriate Industry Self-Regulation**

Meaningful self-regulation is an important complement to the Commission’s law enforcement efforts – particularly in the area of deceptive marketing practices. For example, the program administered by the National Advertising Division/National Advertising Review Council (“NARC”) arm of the Council of Better Business Bureaus (“CBBB”) has worked well to obviate the need for Commission action in some instances. In cases where the process does not reach a successful conclusion, the matter is referred to the Commission with much of the underlying investigative work already accomplished. The Electronic Retailing Self-Regulation Program – established under the auspices of NARC in 2004 to handle allegations of deceptive advertising in TV “infomercials” – has served as an important adjunct to this program.

In addition, self-regulatory programs have been helpful in areas where the Commission has advocated seller restraint in promotions directed to children. In 2006, the CBBB launched the Children’s Food and Beverage Advertising Initiative to encourage major food marketers to impose voluntary limitations on their advertising to children. This effort followed a workshop and report by the FTC, which strongly encouraged self-regulation to address the childhood obesity problem.<sup>633</sup> The marketing of violent entertainment products (such as movies, music, and video games) to children is another area in which companies have been encouraged to adhere to industry codes by

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<sup>630</sup> Consultation with U.K. Consumer Organizations, Sept. 12, 2008.

<sup>631</sup> DeSanti, 7/29 DC Tr. at 163. *See also* AAI TRANSITION REPORT, *supra* note 150, at 186 (“To increase support for the antitrust mission, the agencies should endeavor to educate the public on competition policy and its underlying rationale. The next administration should coordinate with NAAG to add antitrust education to high school curricula.”).

<sup>632</sup> Salinger, 7/29 DC Tr. at 163.

<sup>633</sup> *See* FTC & U.S. DEP’T OF HEALTH & HUMAN SERVS., PERSPECTIVES ON MARKETING, SELF-REGULATION & CHILDHOOD OBESITY: A REPORT ON A JOINT WORKSHOP OF THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF HEALTH & HUMAN SERVICES (2006), *available at* <http://www2.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf>.

successive FTC reports documenting the results of self-regulation.<sup>634</sup> As former Chairman Robert Pitofsky has observed, industry self-regulation can be particularly suitable in areas, such as advertising, in which governmental restrictions raise substantial First Amendment concerns.<sup>635</sup>

External consultations revealed little, if any, objections to the FTC encouraging industry self-regulation. As former BCP Director William MacLeod asserted, asking whether it makes sense for the Commission to encourage self-regulation is “like asking the cop on the street if it makes sense to encourage people to abide by the law. Of course, it does.”<sup>636</sup> Another panelist opined that “the FTC’s done an amazing job of recognizing what a valuable tool self-regulation is in enhancing and complementing [its] role in terms of consumer protection.”<sup>637</sup> Implicit in the support expressed for the agency’s promotion of self-regulation is the notion that it is a complement to – not a substitute for – the agency’s law enforcement efforts.<sup>638</sup>

According to roundtable panelists, the precise role of the agency in encouraging self-regulation matters. Former BCP Assistant Director Darren Bowie argued that that role should be a limited one, with the agency setting forth “broad objectives,” while leaving it up to industry to devise the implementation of such objectives. If the agency is too prescriptive, according to Bowie, it tends to defeat the purpose of self-regulation, which is to allow industry to come up with the best way to accomplish certain objectives.<sup>639</sup> Addressing advertising self-regulation, another panelist attributed the success of that program to both the FTC’s support and its measured involvement. In other words, “[t]he FTC understands that you need to keep the ‘self’ in ‘self-regulation.’”<sup>640</sup>

Roundtable panelists provided commentary on efforts by the FTC to initiate and support self-regulation in specific areas. Lee Peeler praised the agency’s efforts in the

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<sup>634</sup> See, e.g., FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FIFTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES: A REPORT TO CONGRESS (2007)*, available at <http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf>.

<sup>635</sup> See *Conversation with Muris and Pitofsky*, *supra* note 27, at 788 (Pitofsky stating: “I have long believed that ‘real’ industry self-regulation could be a realistic, responsive, and responsible approach to many issues raised by underage drinking. It can deal quickly and flexibly with a range of advertising issues and can bring an industry’s accumulated experience and judgment to bear without the rigidity of government regulation. It can be particularly suitable in this area where government restrictions, especially if they involve partial or total advertising bans, raise very substantial First Amendment issues.”).

<sup>636</sup> MacLeod, 7/30 DC Tr. at 190.

<sup>637</sup> Levine, NY Tr. at 164-65.

<sup>638</sup> To the extent that self-regulation raises competitive concerns in the industry at issue, the FTC – given the dual nature of its mission – is in a unique position to balance the competing interests and promote self-regulation that fulfills the consumer protection need without doing harm to competition.

<sup>639</sup> See Bowie, 7/29 DC Tr. at 114-15.

<sup>640</sup> Levine, NY Tr. at 168.

area of advertising self-regulation,<sup>641</sup> while William MacLeod identified the area of food marketing to children as an example of effective self-regulation.<sup>642</sup> Another panelist, however, criticized the agency's efforts in the area of behavioral advertising, in which the agency's efforts are sending "a very confusing message" to industry: behavioral advertising is a new and emerging area, in which the agency has brought some cases, implying that it may bring more; yet, the agency is issuing self-regulatory guidelines, implying that it believes industry should self-regulate.<sup>643</sup> This concern was echoed by some consumer representatives at the U.K. consultations. They emphasized, however, that self-regulation is an important tool if regulators use it in a timely and proportionate manner – that is, if they do not use a graduated approach such as voluntary guidelines followed by a mandatory code of conduct when there is significant consumer detriment in the market that can be stopped by government action – and view it as one of a mix of tools that will produce good outcomes for consumers.<sup>644</sup>

## 8. Partnership and Outreach with Domestic Agencies

Another important tool available to the FTC is outreach to domestic agencies. The Commission's engagement with domestic agencies involves efforts at the policy level, including advocacy.<sup>645</sup> It also encompasses enforcement cooperation, facilitated by the Commission's broad authority to share with domestic law enforcement agencies nonpublic information otherwise subject to prohibitions on disclosure.<sup>646</sup> Enforcement cooperation can facilitate the Commission's own investigation, where a federal or state agency shares expertise or provides investigative assistance. It also can leverage the Commission's limited resources, by enlisting other agencies in undertaking efforts that advance the FTC's mission.

The FTC often seeks to maximize its enforcement impact on the consumer protection side by coordinating "sweeps" – multiple legal actions filed at or near the same time by multiple authorities. Cooperation with domestic (and foreign) enforcement agencies is an integral component of these sweeps. In 2008, for example, the Commission announced "Operation Tele-PHONEY," the agency's largest sweep targeting telemarketing fraud. More than 180 cases were filed by the FTC and law enforcement partners that included more than 30 federal, state, and local law enforcement

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<sup>641</sup> See Peeler, 7/30 DC Tr. at 166 ("One of the things the FTC has done [is to] encourage[] the development in the advertising area of a self-regulatory system where competitors can go and get those cases resolved very quickly, and that system wouldn't exist except for the encouragement of the FTC when it was being developed and the support of the FTC as it was being implemented."). See also Greenbaum, NY Tr. at 148 ("[T]o say that [advertising] self-regulation is working is just an incredible understatement.").

<sup>642</sup> See MacLeod, 7/30 DC Tr. at 191.

<sup>643</sup> See A. Schwartz, 7/29 DC Tr. at 205-06. Encouraging self-regulation in a particular industry, of course, does not in and of itself preclude the agency from pursuing cases in such industry.

<sup>644</sup> Consultation with U.K. Consumer Organizations, Sept. 12, 2008.

<sup>645</sup> See *supra* Chapters IV.C and VI.B.3.

<sup>646</sup> See *supra* Chapter III.C.

agencies, as well as Canadian authorities at both the national and provincial level. These telemarketing cases were both civil and criminal, targeting various kinds of fraudulent schemes that had snared thousands of consumers and resulted in losses of many millions of dollars.<sup>647</sup> An earlier 2006 sweep, denominated “Project FALSE HOPES,” was directed at fraudulent business opportunity and work-at-home schemes. That effort included more than 100 law enforcement actions filed by the FTC, the Department of Justice, the U.S. Postal Inspection Service, and agencies in 11 states.<sup>648</sup> Consumer education constituted an important component of both sweeps.

## 9. International Partnerships and Outreach

As discussed in Chapter IV.D, and for reasons discussed therein, the FTC recognizes that a competition and consumer protection agency cannot limit its activity or vision to its own borders; the FTC devotes significant efforts to international activity, coordinated by its Office of International Affairs. As with the Commission’s dealings with domestic agencies, these efforts include engagement on policy initiatives and practices as well as enforcement cooperation. An important component of the policy engagement, discussed in Chapter IV.D, is the FTC’s technical assistance program.

To obtain the best results from its engagement with foreign enforcers, both in bilateral and multilateral contexts, an agency with an effective international program develops short-, medium-, and long-term strategies that guide participation in these fora, with a clear idea about when the agency wants to take a leadership role and when the agency plans to take a more passive or “importing” role. The best-designed program identifies areas for teaching, and those for learning, recognizing that the two roles are not mutually exclusive.

Some examples of the FTC’s cooperation on enforcement matters are discussed in Chapter IV.D. As examples of the FTC’s efforts to engage in policy matters in bilateral settings, the FTC (together with DOJ) regularly forms working groups and holds high-level and staff-level discussions with the EC’s DG Comp on a range of issues. The U.S. agencies also have participated in working groups with competition agencies in Mexico, Canada, Korea, and Japan on issues including intellectual property and conduct by dominant firms. The international consultations confirmed the importance of these bilateral initiatives, and also suggested that more efforts could be directed toward the development of additional working groups,<sup>649</sup> joint sponsorship of workshops and conferences,<sup>650</sup> and better sharing of research agendas.<sup>651</sup> In the consumer protection area, the FTC engages in bilateral policy-related dialogue with counterparts on a wide

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<sup>647</sup> See *supra* note 272.

<sup>648</sup> See FTC Press Release, Federal, State Law Enforcers Complete Bogus Business Opportunity Sweep (Dec. 12, 2006), available at <http://www.ftc.gov/opa/2006/12/falsehopes.shtm>.

<sup>649</sup> DC Consultation on International Issues, Nov. 6, 2008.

<sup>650</sup> Consultation with Irish Competition Authority, Nov. 27, 2008.

<sup>651</sup> See Waddams, *London Tr.* at 68.

range of issues, including fraud, consumer redress, privacy, and data security. This dialogue includes face-to-face consultations, as well as telephonic, video, and written exchanges. For example, the FTC routinely comments on both policy and legislative proposals from other jurisdictions on various consumer protection-related issues.<sup>652</sup>

At the multilateral level, several organizations facilitate dialogue and doctrinal and procedural convergence, including the International Competition Network, the Organization for Economic Cooperation and Development, and the International Consumer Protection and Enforcement Network.<sup>653</sup> Many agencies, including the FTC, dedicate many, if not the majority, of their international efforts to activities in these fora. Because of the costs of participating in multilateral organizations and meetings,<sup>654</sup> the consultations stressed that a good international program must prioritize its multilateral efforts. The agency must first decide what percentage of resources will be devoted to this activity, and then the agency must give careful consideration to where or on what topics resources will be spent.<sup>655</sup>

To obtain optimal results from agency-to-agency technical assistance programs, the consultations suggested that such programs are most effective when the focus is on the practical aspects of law enforcement. More specific indicators offered by panelists focused largely on program design. For example, a good technical assistance program in competition either is part of a larger technical assistance program or otherwise clearly contributes to the improved performance of an economy.<sup>656</sup> It is provided on a cooperative and consensual basis<sup>657</sup> and appropriately tailored to the recipient's needs,<sup>658</sup> and the advisors have a working knowledge of the local conditions.<sup>659</sup>

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<sup>652</sup> A recent example of a submission by the FTC to another jurisdiction is a comment submitted to the European Commission relating to draft radio frequency identification policy principles. See FTC Staff Comments to the European Commission on its "Draft Recommendation on the implementation of privacy, data protection and information security principles in applications supported by Radio Frequency Identification (RFID)" (Apr. 2008), available at <http://www.ftc.gov/oia/commentsrfid.pdf>.

<sup>653</sup> Other significant multilateral organizations include the United Nations Conference on Trade and Development, regional organizations such as the Asia-Pacific Economic Cooperation, and a number of specialized networks that deal with specific aspects of consumer protection. For example, a number of international multilateral networks focus on consumer privacy and data security, including OECD's Working Party on Information Security and Privacy, the International Working Group on Data Protection in Telecommunications, the International Conference of Data Protection and Privacy Commissioners, and the Asia Pacific Economic Cooperation Data Privacy Subgroup. In the area of spam and other online threats, there are several networks that focus on both policy and enforcement cooperation, including, for example, the London Action Plan and the European Union's Contact Network of Spam Authorities.

<sup>654</sup> Former Chairman Muris has remarked that achieving success in international consensus building efforts "cannot be done on the cheap." See Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy*, Annual Lecture of the European Foreign Affairs Review (July 23, 2002), available at <http://www.ftc.gov/speeches/muris/020723brussels.shtm>.

<sup>655</sup> See Whish, London Tr. at 144-46.

<sup>656</sup> See Korsun, NY Tr. at 129-31. See also FTC and U.S. Dep't of Justice, International Technical Assistance Workshop: Charting the Future Course of International Technical Assistance (Feb. 6, 2008), <http://www.ftc.gov/oia/wkshp/index.shtm>.

<sup>657</sup> See Whish, London Tr. at 149; Consultation with Canadian Competition Bureau, Sept. 17, 2008.

On the enforcement side, the Commission’s work with its foreign counterparts facilitates its ability to obtain meaningful and timely cooperation from foreign counterparts for FTC-generated investigations and litigation matters. Another critical dimension is the agency’s ability to influence the enforcement agenda and priorities of foreign agencies through notifications, consultations, and other bilateral mechanisms. A third dimension is the FTC’s capacity to provide assistance, in appropriate cases, to foreign authorities when they request the FTC’s assistance or refer complaints involving U.S. businesses.

## **10. Other Innovative Approaches to Addressing Specific Problems**

The FTC pursues other innovative approaches to address specific problems. As an example, an innovative approach to business guidance has been to enlist the help of the media to ensure that deceptive advertising claims are not disseminated. A survey of ads for weight-loss products revealed that about half of them contained at least one claim that was facially false. In response, the Commission published a guide – appropriately titled *Red Flag Bogus Weight Loss Claims* – describing seven claims for nonprescription weight-loss products that should raise red flags because they are always false. FTC Commissioners met with members of the media and asked that they “do the right thing” by refusing to run ads containing these false claims. Although many initially resisted this request, it appears that some have complied. In a follow-up survey, FTC staff found that the incidence of “Red Flag” claims had declined significantly. Thus, the Red Flag project essentially combined business education with promotion of self-regulation.<sup>660</sup>

Former Commissioner Leary characterized this approach as “innovative,” discounting the notion held by some that it was legally risky under the antitrust laws. Leary emphasized that this tactic does not violate the antitrust laws, properly construed. He further commended the program for attacking the supply side (*i.e.* the advertisers) of the fraud equation, not just the demand side (*i.e.* consumers).<sup>661</sup>

## **11. Using Multiple Tools to Address a Problem**

In pursuing outcomes that benefit consumers, the FTC can use multiple tools to address a particular problem. For example, the agency has used such a multifaceted approach in dealing with the issues of rising obesity rates and false or deceptive advertising claims about weight-loss products. In addition to the innovative Red Flag project mentioned above, the agency has conducted or co-sponsored several public workshops to address: the impact of advertising for weight-loss products and programs; the information consumers need to evaluate such products; and food marketing to

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<sup>658</sup> Consultation with Agencies at the OECD Latin America Competition Forum, Sept. 10, 2008.

<sup>659</sup> See Korsun, NY Tr. at 130.

<sup>660</sup> Additional information regarding the Red Flag project is available at <http://www.ftc.gov/bcp/conline/edcams/redflag/>.

<sup>661</sup> See Leary, 7/29 DC Tr. at 31-32.

children. The FTC has issued reports on these topics; conducted surveys of weight-loss advertising; engaged in multimedia education directed to both consumers and businesses; and encouraged industry self-regulation and international cooperation.<sup>662</sup> Of course, the FTC conducts litigation as well, having sued companies that promote their products with false or deceptive claims.<sup>663</sup> As in other areas of FTC enforcement, often several weight-loss cases are announced simultaneously in order to maximize the deterrent effect of the enforcement activity.

The FTC also has used an integrated approach to preventing anticompetitive increases in the price of petroleum products, including oil, gasoline, and diesel. Given the crucial role that the petroleum industry plays in consumers' lives and the U.S. economy generally, that industry receives the highest level of scrutiny from the FTC. Utilizing its law enforcement authority and resources, the FTC has filed actions to enjoin petroleum mergers deemed to be anticompetitive.<sup>664</sup> The FTC's enforcement work in this area also includes challenging possibly anticompetitive conduct by firms in this sector of the economy,<sup>665</sup> aided in significant part by the gasoline and diesel price monitoring project that was begun in 2002.<sup>666</sup>

In addition to enforcement, the FTC engages in significant policy R&D efforts in the petroleum area, holding workshops, engaging in relevant research, and drafting congressionally requested reports.<sup>667</sup> Another tool used by the FTC in this area is outreach to domestic agencies and consumers, as exemplified by the agency's efforts following the September 2008 landfall of Hurricane Ike in the U.S. Gulf Coast. In the aftermath of the storm, the FTC established a task force comprising staff from throughout the agency, with the mission of closely tracking gasoline price trends and supply

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<sup>662</sup> Information regarding FTC workshops, guides, reports, and other efforts in the weight-loss area is available at <http://www.ftc.gov/bcp/menus/resources/guidance/health.shtm>. Weight-loss-related consumer education materials are available at <http://www.ftc.gov/bcp/menus/consumer/health/weight.shtm>.

<sup>663</sup> See, e.g., FTC Press Release, Marketers of "Ab Force" Weight Loss Device Agree to Pay \$7 Million for Consumer Redress (Jan. 14, 2009), available at <http://www.ftc.gov/opa/2009/01/telebrands.shtm>.

<sup>664</sup> See, e.g., FTC Press Release, FTC Dismisses Administrative Complaint Challenging Acquisition of The Peoples Natural Gas Company from Dominion Resources, Inc.: Parties Abandoned Proposed Transaction after Commission Challenge (Feb. 4, 2008), available at <http://www.ftc.gov/opa/2008/02/dom.shtm>; FTC v. Equitable Resources, Inc., No. 07-2499 (3d Cir. Feb. 22, 2008) (order granting motion to vacate district court decision against the FTC).

<sup>665</sup> See, e.g., Union Oil Co. of Cal., FTC Dkt. No. 9305 (involving allegations that Unocal illegally acquired monopoly power in the technology market for producing certain low-emission gasoline for sale and use in California; the settlement in 2005 resulted in savings to California consumers of about \$500 million per year).

<sup>666</sup> See *supra* note 187. In addition, pursuant to Section 811 of the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, the Commission is conducting a rulemaking proceeding addressing petroleum market manipulation. Information regarding this rulemaking is available at <http://www.ftc.gov/ftc/oilgas/rules.htm>.

<sup>667</sup> See, e.g., reports cited *infra* note 809.

information, and developing ways to be as responsive as possible to state authorities and to individual consumers who might need the FTC's assistance.<sup>668</sup>

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As discussed above, the FTC has many tools in its arsenal with which to pursue its competition and consumer protection missions. Identifying the appropriate tool or tools with which to address each of the many challenges facing the agency in its pursuit of those missions is crucial to the agency's effectiveness. In many instances, law enforcement will be the most useful tool; in many other instances, nonenforcement tools will be more effective. In some instances, the simultaneous or serial use of several tools will yield the best results for consumers.

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<sup>668</sup> See, e.g., FTC, Consumer Complaints about Hurricane Ike, <http://www.ftc.gov/bcp/edu/microsites/recovery/hurricane/hurricane-ike-complaints.shtml> (website allowing consumers to submit complaints about gasoline prices or questionable business practices).

## PART 3: MEASURING THE EFFECTIVENESS OF FTC ACTIONS

### VII. Measuring Agency Effectiveness

As noted in Chapter I, there is widespread agreement about the agency's core mission, as set forth in its strategic plan:

To prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these missions without unduly burdening legitimate business activity.<sup>669</sup>

For assessing agency performance, as also explained in Chapter I, there should be a close nexus between what is measured and fulfillment of an agency's mission. Further, performance measurement should focus on outcomes for consumers rather than agency output.<sup>670</sup> In any event, metrics chosen should ideally answer the question: "what would have happened in the absence of [FTC] intervention and in the absence of [FTC] activity?"<sup>671</sup> If the answer is that consumers are worse off in the hypothetical world of no FTC action, such action can be said to have affected consumers positively.<sup>672</sup>

With an understanding of the value of particular FTC actions, agency heads can evaluate whether the resource costs of undertaking certain activities – which are known – justify the benefits achieved for consumers or whether the FTC could have achieved these benefits more efficiently.<sup>673</sup> Further, given scarcity of resources, understanding the value of competing programs can help identify the full opportunity cost of forgone alternative actions. Knowledge of opportunity costs can help prioritize actions both within the FTC and across government agencies.

Unlike agencies that produce a readily measurable output directly to consumers,<sup>674</sup> the vast majority of FTC actions are not aimed at consumers directly, but rather toward parties – typically business and sometimes government – in an effort to stop conduct that threatens to harm consumers.<sup>675</sup> For example, the FTC sues businesses

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<sup>669</sup> 2006 FTC STRATEGIC PLAN, *supra* note 26, at 1.

<sup>670</sup> See Sidney Shapiro & Rina Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1770 (2008).

<sup>671</sup> Breul, 7/30 DC Tr. at 24-25.

<sup>672</sup> Of course, FTC *inaction* also can create value for consumers. For example, to the extent that the FTC opts not to challenge a merger or nonmerger conduct that is likely to improve welfare, its inaction improves consumer welfare.

<sup>673</sup> See Breul, 7/30 DC Tr. at 24.

<sup>674</sup> For example, the United States Postal Service delivers mail, and the Social Security Administration assures beneficiaries receive their benefits on time. See WILSON, *supra* note 16, at 34-36.

<sup>675</sup> Consumer education is an exception to this characterization. Unlike in the case of antitrust violations, consumers can take actions to reduce the probability of becoming a victim of fraud and deception. Thus,

for taking actions that violate the consumer protection and competition laws and engages in advocacy with governments to discourage anticompetitive regulation. Thus, there is an indirect link between FTC action and changes in consumer welfare: the FTC helps consumers primarily through its ability to reduce the occurrence of conduct that violates consumer protection or antitrust laws or otherwise reduces consumer welfare. Ideally, one could measure the direct impact of FTC actions on consumers.<sup>676</sup> When this type of direct measurement is not feasible, however, it is necessary to look for proxies for the impact of FTC actions on consumers, such as the outcomes of enforcement actions and the influence of nonenforcement activity on courts and government policymakers.

This chapter considers a range of possible measurement metrics that are or could be used to assess the FTC's performance. Section A addresses the possibility (and challenges) of measuring directly the impacts of the Commission's actions, as well as the possibilities (and challenges) of accounting for impacts that may be less direct but more important, such as the deterrent and precedential effects of agency litigation.

Section B discusses several proxies for measuring the degree to which FTC actions further its mission. Specifically, this section describes some of the metrics the FTC currently uses in its annual Performance and Accountability Report and also examines other performance metrics, including the outcome of enforcement actions, the deterrent effect and precedential value of these actions, the FTC's intellectual leadership, the agency's transparency and guidance (which can facilitate compliance with the law without the costs of litigation), and the burdens the FTC places on industry.

Section C addresses the agency's relations with its core constituencies. In addition to outcomes that are directly or indirectly measurable, having a reputation as an agency that can solve problems is important, although not usually readily measurable. To maintain its relevancy, a successful agency needs to understand and take action – consistent with its mission – on the issues on which the public, Congress, and the White House are focused – areas of political value.<sup>677</sup> As one panelist explained, organizations that are “deaf” to these issues, find themselves “as part of the problem, and not really part of the solution.”<sup>678</sup>

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targeting messages directly to consumers to inform them of these actions can reduce the occurrence of fraud and deception.

<sup>676</sup> See, e.g., Breul, 7/30 DC Tr. at 28-29 (“without that focus on outcomes, you’re likely to be spending your time on a lot of activity that may or may not be critical to achieving the real purpose and the real objective of the Commission”); Calkins, 7/30 DC Tr. at 119 (“you can say that you’ve done all sorts of different things and it only begins the discussion about whether those are things that have made the world better or worse”). A participant in the external consultations noted that the 1993 Hilmer Commission report, *Effectiveness of Competition Policy*, was particularly effective because of its quantitative character. Melbourne Consultation with Private Sector Stakeholders, Oct. 2, 2008.

<sup>677</sup> See Breul, 7/30 DC Tr. at 12.

<sup>678</sup> *Id.* at 34.

## A. Direct Measurements of Welfare

Given widespread acceptance of the FTC's consumer-focused mission, direct measurement of the increase in consumer welfare as a result of FTC actions would be ideal.<sup>679</sup> There was broad consensus among roundtable panelists that the FTC should aim to measure its benefits by assessing welfare and avoid incorporating improved or increased "fairness" as a goal or an objective that should be counted as a benefit of FTC enforcement.<sup>680</sup> Others opined that such decisions between welfare and other objectives (fairness or otherwise) were better left to the political process and elected officials rather than government agencies.<sup>681</sup>

Although there is general recognition that welfare is the appropriate measure for evaluating the benefits of FTC actions, how best to define "welfare" remains subject to much debate. This debate falls along familiar lines of "total" welfare (producer plus consumer surplus) versus "consumer" welfare (consumer surplus alone).<sup>682</sup> Some argue that total welfare is the appropriate standard because it focuses attention on maximizing societal welfare.<sup>683</sup> Further, producers ultimately are consumers as well (although of

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<sup>679</sup> See ABA TRANSITION REPORT, *supra* note 11, at 28 ("As in the merger review context, a key means of increasing confidence in the agencies' non-merger civil enforcement efforts is to conduct a rigorous empirical analysis of whether these efforts are enhancing consumer welfare.").

<sup>680</sup> See, e.g., Bloom, London Tr. at 23; Humpherson, London Tr. at 24.

<sup>681</sup> See Pritchard, London Tr. at 29; Bloom, London Tr. at 31. Indeed, one commentator has noted that if fairness "trumps" welfare, then some individuals will be made worse off and, in some circumstances, *everyone* will be made worse off than if fairness considerations were omitted. See LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 52 (2002); see also Peter Freeman, Chairman of the United Kingdom Competition Commission, *Is Competition Everything?*, Address before Law Society European Group, at 10 (July 21, 2008), available at [http://www.competition-commission.org.uk/our\\_role/speeches/pdf/freeman\\_law\\_society\\_210708.pdf](http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_law_society_210708.pdf) ("The idea that competition is just another policy to be weighed in the balance against others is insidious and potentially dangerous to the functioning of the economy.").

<sup>682</sup> Although the term consumer welfare is understood differently depending on the observer, see, e.g., ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 3, 26 n.22 (2007) [hereinafter AMC REPORT] ("Debate continues about the precise definition of 'consumer welfare.'"), current usage generally favors defining the term to mean the welfare of end consumers. See, e.g., Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, Comments Filed with the Antitrust Modernization Commission (Nov. 4, 2005), available at [http://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/exclus\\_conduct\\_pdf/051104\\_Salop\\_Mergers.pdf](http://govinfo.library.unt.edu/amc/public_studies_fr28902/exclus_conduct_pdf/051104_Salop_Mergers.pdf). As a technical matter, total welfare is the area under the demand curve above marginal cost, and consumer welfare is the area under the demand curve above equilibrium price. In instances where price is equal to marginal cost and marginal cost is constant, total welfare is equal to consumer welfare.

<sup>683</sup> See Jenny, Paris Tr. at 63 (arguing that a focus on consumer welfare is detrimental to an agency's ability to persuade other policymakers because "it seems to pit the suppliers against the consumer"); Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, at 2 (Economic Analysis Group Discussion Paper No. EAG 07-3, 2007), available at <http://www.usdoj.gov/atr/public/eag/221242.pdf>.

other goods),<sup>684</sup> and in the long run, gains to producers eventually may accrue to consumers in the form of lower prices.<sup>685</sup> Others argue that a consumer welfare standard is most consistent with the antitrust laws and helps ensure consumers are protected by the antitrust laws.<sup>686</sup> Some suggest that a middle ground is appropriate – that is, a “weighted” surplus standard that would ensure consumer welfare is increased, but not at the expense of preventing significantly larger gains to aggregate welfare.<sup>687</sup> No panelists suggested that the welfare standard used to evaluate FTC actions should differ depending on the nature of the action at issue. Likewise, none of the panelists suggested that the standard should differ depending on the industry at issue or other characteristics of the given matter. Although the debate is an important one, in the vast majority of instances, consumer welfare and total welfare align.<sup>688</sup> As a result, there only infrequently is a conflict between advancing each goal.

As a practical matter, direct measurement of welfare effects entails comparing price and output in the relevant markets before and after the FTC action.<sup>689</sup> For example, consumers pay higher prices and purchase fewer goods or services than they otherwise would in the case of an antitrust violation. As a result, consumers suffer direct financial losses, and also forego the satisfaction they could have received from additional purchases, had the price been set at the competitive level. Calculating the magnitude of

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<sup>684</sup> See, e.g., Kenneth Heyer, *Welfare Standards and Merger Analysis: Why not the Best?*, at 3 (Economic Analysis Group Discussion Paper No. EAG 06-8, 2006), available at <http://www.usdoj.gov/atr/public/eag/221880.pdf>.

<sup>685</sup> See Padilla, Brussels Tr. at 68.

<sup>686</sup> See, e.g., Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 516 (2006); Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, (Economic Analysis Group Discussion Paper No. EAG 07-9, 2007), available at <http://www.usdoj.gov/atr/public/eag/225696.pdf>; see also Elhauge, Boston Tr. at 23-24 (arguing that the FTC should focus on consumer welfare; anything that benefits total welfare also can be made to benefit consumer welfare; and total welfare is harder to coordinate nationally because nations have different incentives to favor producers or consumers, depending on whether they are importers or exporters). Others argue that a consumer welfare standard is appropriate because it helps rebalance a bias toward producer welfare, and setting enforcement “preferences” more strictly than ideal helps compensate for “cheating” around the edges. See Vickers, London Tr. at 11, 25.

<sup>687</sup> See, e.g., Wolfgang Kerber, *Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law*, at 20 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1075265](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075265).

<sup>688</sup> See, e.g., Baker, *supra* note 686, at 521 (“The welfare dispute has limited practical importance because harm to consumers and harm to aggregate welfare tend to go hand-in-hand.”); Carlton, *supra* note 683, at 4 (arguing that, although total welfare is the preferable standard, “[f]or most situations there is unlikely to be a different outcome regardless of the standard used. The reason is that actions that achieve efficiencies should be expected to help consumers.”). There are some circumstances in which the two standards result in different outcomes. See Baker, *supra* note 686, at 516-18 (describing five circumstances).

<sup>689</sup> See Rubin, 7/30 DC Tr. at 139-40; see also Philip Lowe, *The Design of Competition Policy Institutions for the 21<sup>st</sup> Century – The Experience of the European Commission and DG Competition*, 3 COMPETITION POL’Y NEWSLETTER 1, 9 (2008), available at [http://ec.europa.eu/competition/publications/cpn/cpn2008\\_3.pdf](http://ec.europa.eu/competition/publications/cpn/cpn2008_3.pdf) (“[I]n order to really know whether we achieve our ultimate objective of making markets work better, we need to measure the impact of our decisions on those markets.”).

these two types of loss – and thus the benefits from FTC action – requires an estimate of the shape and position of the demand and marginal cost curves for the product, as well as an estimate of the equilibrium price and quantity absent the anticompetitive conduct.

Turning to consumer protection, deceptive advertising makes consumers willing to buy more at any given price than they would had they not been misled about the quality of the product or the level of substantiation for performance claims.<sup>690</sup> Consequently, unlike in the case of anticompetitive conduct, deceived consumers are harmed because they generally will buy more of the product (and may pay a higher price<sup>691</sup>) than they would if they knew the product's true attributes. Calculation of consumer injury from deception is straightforward in the extreme case of outright fraud, where a seller claims performance capabilities for a product that is in reality worthless. If consumers knew the truth before purchase, they would be unwilling to pay any price for the product, and all of the expenditures they actually make can be considered injury. In addition, scarce resources have been diverted from genuinely productive uses, with a resulting loss to society equal to the value of those resources. Therefore, the short-run economic benefit from the Commission's fraud program, for example, can be measured directly as the quantity of money consumers would have continued to spend on products that FTC enforcement action effectively has removed from the marketplace.<sup>692</sup> Further, any restitution for consumers that the FTC is able to secure from fraudulent sellers also enhances consumer welfare.

Assessment of consumer injury and the immediate benefit of Commission intervention is generally much more complex in cases where there is not outright fraud but rather where firms do not substantiate advertising claims or where they omit information important to a purchase decision. Although the advertising claims may exaggerate the effectiveness of the product, or tout capabilities that do not exist, many consumers might continue to purchase the product in the absence of deceptive claims, albeit in smaller quantities (and possibly at a lower price). The gap between the demand for the product with accurate information and the demand fueled by deceptive claims would, in most cases, be extremely difficult to estimate with any precision. A fully rigorous analysis would have to take into account the magnitude of the reduction in consumer demand if consumers obtained accurate information about product performance. Further, if consumers erroneously view a product as having fewer substitutes than it actually does, they will be less sensitive to price increases than they otherwise would. Finally, as in the case of fraud and anticompetitive conduct, any study would have to construct the market price and quantity absent the deception.

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<sup>690</sup> Technically, anticompetitive conduct causes a movement along the demand curve to a higher price and lower output level, whereas deception causes the demand curve to shift outward, causing output to rise and, depending on the shape of firms' cost curves, price perhaps to rise.

<sup>691</sup> The extent to which the price for a product rises with an increase in demand depends on the shape of the underlying marginal cost curves of the relevant firms.

<sup>692</sup> The primary longer-term benefit, as discussed below, is deterrence.

Of course, events unassociated with FTC actions also affect cost and demand conditions and, hence, observed prices. To isolate welfare changes resulting from the FTC's competition and consumer protection actions, it is important to control for other factors that also affect market outcomes and that occurred during a similar time frame.<sup>693</sup> This exercise requires constructing a hypothetical control market that is identical to the one in which the FTC intervened. One way to construct a control group is to identify markets – similar geographic or product markets not subject to the FTC action – to serve as benchmarks and then to control statistically for any remaining differences between the treatment and control groups. Panelists noted that this type of before-and-after study may not be feasible for broad national actions because there would not be an adequate control group to serve as a benchmark.<sup>694</sup> Such studies, however, may be feasible for narrow, targeted efforts concentrated in a single geography or industry.<sup>695</sup>

Several panelists addressed the promise and problems associated with direct measurement of market outcomes after FTC action in the context of merger retrospectives. Because mergers make up a large portion of the FTC's competition caseload, the ability to evaluate the effect of mergers on consumers would go a long way toward direct evaluation of the FTC's competition program. The Government Accountability Office recently released a report that calls for more retrospective work on the oil industry.<sup>696</sup> These discussions, moreover, are illustrative of the methodological issues surrounding direct measurement of welfare effects from FTC actions more generally.<sup>697</sup>

There generally was widespread agreement that reviewing merger enforcement decisions *ex post* potentially could shed light on the value of FTC merger enforcement to consumers.<sup>698</sup> Panelists, however, also spoke extensively about the limitations of such

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<sup>693</sup> See Ellig, 7/30 DC Tr. at 19 (noting that to evaluate how the FTC's activities contributed to observed market outcomes, the focus should be on outcomes relative to a control rather than just examining a trend).

<sup>694</sup> See Rose, Boston Tr. at 93-94; Rubin, 7/30 DC Tr. at 139.

<sup>695</sup> See Rubin, 7/30 DC Tr. at 139.

<sup>696</sup> GOV'T ACCOUNTABILITY OFFICE, ENERGY MARKETS: ANALYSIS OF MORE PAST MERGERS COULD ENHANCE FEDERAL TRADE COMMISSION'S EFFORTS TO MAINTAIN COMPETITION IN THE PETROLEUM INDUSTRY (2008), available at <http://www.gao.gov/new.items/d081082.pdf>.

<sup>697</sup> As discussed above in Chapter VI.B.7, the FTC promotes industry self-regulation where appropriate. Professor Chris Hoofnagle submitted an online comment recommending that the FTC "develop standards for evaluating the efficacy of self-regulation." In doing so, Hoofnagle recommended that the agency define how long self-regulation should take to solve the problem at issue and what an acceptable solution is. Online Submission of Chris Hoofnagle, Aug. 27, 2008.

<sup>698</sup> See, e.g., Wright, Chicago Tr. at 171; Carlton and Nevo, Chicago Tr. at 216-17, 220-22. Perhaps the most positive voices regarding retrospective work were Ghosal (7/30 DC Tr. at 242-44, 273-74), who sees such work as one of many ways to get potentially useful information about antitrust effects, Picker (Chicago Tr. at 166-69), and Scheffman (NY Tr. at 79-80). In addition, Padilla (Brussels Tr. at 80-81) noted the ease and low cost of doing stock market-based event studies as a means of evaluating the effectiveness of mergers, although some DC roundtable participants derided stock market-based studies. See, e.g., Werden, 7/30 DC Tr. at 227. Much merger retrospective work has been done in the U.S. and in Europe. Some of that work has been funded by governments, but other studies have been done independently. For a recent survey of several merger retrospectives focused on pre- and postmerger price

studies.<sup>699</sup> For example, it can be hard to devise controls for the counterfactual (“but-for”) world for allowed and blocked mergers, which can affect the inferences that can be drawn from merger retrospectives. Further, studying only challenged mergers is likely to lead to conclusions that the agency makes more errors than it actually does, because liability in those matters tends to be the least clear cut and therefore most prone to agency error and, moreover, may result from aggressive enforcement intended to enhance deterrence.<sup>700</sup> One commenter, however, noted that retrospective results can be valuable especially if they indicate that prices rose after the parties consummated an unchallenged merger, because this result would run counter to this “selection bias.”<sup>701</sup> The extent to which any retrospective could be generalized beyond the merger (or mergers) evaluated is also unclear, given that each merger is unique both factually and analytically.<sup>702</sup> One also can criticize selective self-assessment work due to potential researcher bias, which may be one reason to have assessments conducted by those outside the FTC.<sup>703</sup> Finally, participants noted that the retrospective approach cannot measure the most important aspect of antitrust – the value of deterrence. The benefits of deterrence, moreover, may be dispersed through many markets, making their measurement even more difficult.<sup>704</sup>

Dennis Carlton proposed that a more effective way to conduct a merger retrospective may be to use internal agency predictions as the benchmark rather than

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effects, see Matthew Weinberg, *The Price Effects of Horizontal Mergers*, 4 J. COMPETITION L. & ECON. 433 (2008). For an example of work done on 10 horizontal mergers for the U.K. OFT, see Eric Morrison & David Elliott, PwC Economics, *Ex Post Evaluation of Mergers: A Report Prepared for the Office of Fair Trading, Department of Trade and Industry, and the Competition Commission* (OFT Economic Discussion Paper, 2005) [hereinafter OFT/PwC, *Ex Post Evaluation*], available at [http://www.of.gov.uk/shared\\_of/reports/comp\\_policy/of767.pdf](http://www.of.gov.uk/shared_of/reports/comp_policy/of767.pdf). For a broader description of pre-2002 work on merger retrospectives, see Paul A. Pautler, *Evidence on Mergers and Acquisitions*, 48 ANTITRUST BULL. 119, 166-84 (2003).

<sup>699</sup> See Carlton, Chicago Tr. at 218-22; Heyer, 7/30 DC Tr. at 88-89; Krattenmaker, 7/30 DC Tr. at 94-95; Werden, 7/30 DC Tr. at 212-13, 228-29, 252-55. See also Dennis W. Carlton, *The Need to Measure the Effect of Merger Policy and How to Do It* (Economic Analysis Group Discussion Paper No. EAG 07-15, 2007), available at <http://www.usdoj.gov/atr/public/eag/228687.pdf> (calling for ex ante predictions from the antitrust agencies regarding postmerger effects on price, output, and dimensions of quality or innovation).

<sup>700</sup> See Wickelgren, Chicago Tr. at 209-10. Providing a cautionary note on self-assessments, Damien Neven and Hans Zenger recently have argued that such ex post assessments might be misleading to regulators and may cause agencies to choose the wrong strategies. See Damien Neven & Hans Zenger, *Ex Post Evaluation of Enforcement: A Principal-Agent Perspective* (DG Comp Discussion Paper, 2008), available at [http://ec.europa.eu/dgs/competition/economist/ex\\_post\\_evaluation.pdf](http://ec.europa.eu/dgs/competition/economist/ex_post_evaluation.pdf).

<sup>701</sup> Chicago Tr. at 291-92 (audience member Joe Farrell).

<sup>702</sup> See Heyer, 7/30 DC Tr. 88-89.

<sup>703</sup> Several panelists mentioned that assessments of outcomes (particularly merger retrospective work) might best be done by those outside the agency to avoid such potential bias problems. See Salinger 7/29 DC Tr. at 143-44; Crandall 7/30 DC Tr. at 203, 271; Werden, 7/30 DC Tr. at 272. Consultation participants also indicated that the ex post evaluation of DG Comp projects is occasionally done, and it is typically contracted out. Consultation with DG Comp, Oct. 21, 2008.

<sup>704</sup> See Wright, Chicago Tr. at 135

merely to rely on pre- and postmerger data to construct a hypothetical but-for market.<sup>705</sup> This approach would require the agency to make more explicit predictions about the likely outcome of mergers, as well as explain the basis for those predictions, and it would permit the agency to determine not only whether its predictions are accurate but also whether particular economic modeling techniques are accurate or whether there is bias.<sup>706</sup> In Carlton's view, such an approach would result in more robust conclusions than merely taking a sample of mergers to determine whether competition seems to have been harmed or improved.<sup>707</sup>

The Office of Fair Trading recently has pursued retrospective work by performing an ex ante analysis that results in estimates and baselines for the assessment of mergers.<sup>708</sup> The ex ante estimates assist in any ex post evaluations. Although it has not frequently performed ex post evaluations, OFT usually uses external parties to conduct those evaluations in order to avoid possible bias.<sup>709</sup> For example, OFT, along with the Competition Commission, commissioned PricewaterhouseCoopers ("PwC") to review mergers cleared by the Competition Commission to determine whether the clearance decision was correct.<sup>710</sup>

Other proponents of merger retrospectives argued that they need not all be price-focused, state-of-the-art empirical projects, but rather they can be useful if they provide replicable measures of postmerger performance on any of several dimensions. For example, former BE Director David Scheffman noted the relative ease of doing merger retrospectives based on customer surveys.<sup>711</sup> In addition, Nancy Rose and former Commissioner Dennis Yao proposed doing more merger retrospective work focused on the attainment of predicted merger efficiencies.<sup>712</sup>

Apart from the conceptual concerns with merger retrospectives, several panelists highlighted the difficulty of obtaining useful data as a constraint on any efforts to perform

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<sup>705</sup> Carlton, Chicago Tr. at 220-21.

<sup>706</sup> *Id.*

<sup>707</sup> *Id.* at 228.

<sup>708</sup> Consultation with OFT, Sept. 11, 2008.

<sup>709</sup> *See supra* note 703.

<sup>710</sup> *See* OFT/PwC, *Ex Post Evaluation*, *supra* note 698. PwC looked at economic indicators such as entry and innovation and conducted interviews. PwC determined that in one case it was too early to tell if the enforcement decision was correct; in the other nine cases, the decision was found to have been correct. *Id.* at 2.

<sup>711</sup> Scheffman, NY Tr. at 79-80.

<sup>712</sup> Rose and Yao, Boston Tr. at 118-21. Presumably these efficiency-focused retrospectives might follow the mold of that done for the Union Pacific/Southern Pacific rail merger. *See* Denis A. Breen, *The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits* (FTC Bureau of Economics Working Paper No. 269, 2004), available at <http://www.ftc.gov/be/workpapers/wp269.pdf>. Ghosal (7/30 DC Tr. at 273) also suggested a focus on efficiency retrospectives following the Breen case study model. That study may have been unique, however, because the author had access to extensive records of the Surface Transportation Board as well as to information voluntarily provided by the merging firms.

retrospective studies.<sup>713</sup> As one panelist explained, “as an academic to get data, and especially these days, is very difficult. . . . [T]he conditions under which private parties hand academics data is an enormously controversial subject these days.”<sup>714</sup> Further, although the FTC may have the ability to obtain information before the merger and turn it over to academics for analysis in some circumstances,<sup>715</sup> this does not alleviate the problems with obtaining postmerger data. As Carlton noted, “even if you can get the DOJ and FTC economists to give you data, it’s not obvious you can get it from the industry after the merger has closed. . . . I think that’s been one of the difficulties with doing retrospective studies.”<sup>716</sup> Some suggested that conditioning access to data as part of resolving an inquiry may be one way to obtain useful information for a retrospective study.<sup>717</sup>

Although reliable data for merger retrospectives is difficult to obtain, getting the data is possible if one is willing to bear (and impose) the substantial acquisition costs. For example, the FTC recently released three economic working papers that examine the after-effects of four hospital mergers in three areas: (1) the east bay area of San Francisco in 1999; (2) the northern Chicago lakeside area in 2000; and (3) Wilmington, North Carolina in 1998.<sup>718</sup> Each paper measures price effects of the merger based on information from local insurers who pay for the hospital care and uses econometric modeling and multiple different control groups of hospitals to obtain reliable comparisons. The results across the markets are quite diverse and, therefore, of interest.

As can be seen from the discussion above, directly measuring the change in consumer welfare from FTC actions is fraught with difficulties. Even if done perfectly, moreover, these techniques probably would fail to capture the full deterrent and precedential effects from competition and consumer protection enforcement. As

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<sup>713</sup> See, e.g., Carlton, Chicago Tr. at 242; Heimler and Leveque, Paris Tr. at 120-21 (discussing the possibility of conducting such reviews in the European Commission context).

<sup>714</sup> Picker, Chicago Tr. at 175.

<sup>715</sup> See *supra* note 326.

<sup>716</sup> Carlton, Chicago Tr. at 242-43.

<sup>717</sup> See Picker, Chicago Tr. at 175 (“you guys obviously have a mechanism for getting access to information and can do this as part of a consent decree that I don’t begin to have”); *id.* at 176 (suggesting a retrospective version of the Hart-Scott-Rodino Act). Another panelist argued that “the FTC actually might have leverage to say, well, instead of closing this investigation, how about we agree to close it on the condition that you turn over data so that we can study the effects in the future?” Wickelgren, Chicago Tr. at 243. Carlton agreed that this is a good idea, generally, but indicated that, in his experience, the enforcement agencies disfavor this approach, especially the Department of Justice. See Carlton, Chicago Tr. at 243 (“I think the question [for the agencies] is does it impinge on you getting something that is above and beyond what your charge is that you’re entitled to.”).

<sup>718</sup> Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction* (FTC Bureau of Economics Working Paper No. 293, 2008); Deborah Haas-Wilson & Christopher Garmon, *Two Hospital Mergers on Chicago’s North Shore: A Retrospective Study* (FTC Bureau of Economics Working Paper No. 294, 2009); Aileen Thompson, *The Effect of Hospital Mergers on Inpatient Prices: A Case Study of the New Hanover-Cape Fear Transaction* (FTC Bureau of Economics Working Paper No. 295, 2009). These working papers are available at <http://www.ftc.gov/be/econwork.shtm>.

discussed in more detail below, these benefits are likely to be more important than the direct impact of stopping particular anticompetitive, unfair, or deceptive conduct. For example, accurate measures of the price and quantity effects of a successful antitrust action will capture the direct impact of preventing the particular anticompetitive conduct in question, and depending on the time frame, it also may capture some of the deterrent and precedential effects (to the extent there are any) flowing from FTC enforcement. This measurement, however, would fail to capture improvements in consumer welfare from deterrent and precedential effects that spill over into different product and geographic markets. To capture fully such improvements in consumer welfare would require identifying the spillover markets and then measuring price and quantity effects in each of these markets.

Directly measuring the change in consumer welfare due to research and advocacy is likely to be even more difficult than measuring the full impact of enforcement actions. These important FTC tools affect consumer welfare in subtle ways, and often in diffuse markets. For example, past research on optometric business practices and the real estate brokerage industry likely has influenced state laws regulating these industries. To capture fully the welfare effects of this research, however, would require isolating both the marginal impact of FTC research on state regulation and the impact of positive regulatory changes on price and output in the relevant markets. Further, as with enforcement actions, research and advocacy are likely to have spillover deterrent effects in related markets. For example, successful advocacy in one state may prevent other state regulatory bodies from entertaining similar restrictions on competition, and research often can have applications beyond the industry on which it is focused.

Finally, the FTC provides guidance to parties in an effort to prevent antitrust and consumer protection violations in the first instance. It also tries to minimize the costs it imposes on parties, both in terms of direct compliance costs and errors in case selection. That there is likely to be a far more attenuated link between these FTC actions and market outcomes than between enforcement and market outcomes exacerbates the measurement issues discussed above.

## **B. Proxies for Direct Welfare Measurements**

As discussed above, there are inherent difficulties associated with the direct measurement of the change in welfare from FTC actions. Although it may be possible to measure the direct benefits of specific FTC actions in some circumstances, more often the agency must rely on proxies – often focused on agency outputs or intermediate outcomes – to gauge welfare effects.

The FTC currently undertakes an annual performance evaluation and submits a Performance and Accountability Report (“PAR”) <sup>719</sup> in accordance with several statutes,

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<sup>719</sup> FTC, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2008 (2008) [hereinafter FTC PAR], available at <http://www.ftc.gov/opp/gpra/2008parreport.pdf>.

including the Government Performance and Results Act (“GPRA”).<sup>720</sup> Congress designed GPRA to improve government efficiency, and it requires agencies to develop strategic goals, define plans to achieve these goals, and develop means to measure agency performance relative to these goals. In the PAR, the FTC broadly sets out four objectives for its strategic goals to protect consumers and maintain competition: (1) identify fraud, deception, unfair practices, and anticompetitive conduct; (2) stop this conduct; (3) prevent consumer injury through education; and (4) engage in research, reports, advocacy, and international cooperation.<sup>721</sup> The PAR does not measure changes in welfare directly, but instead uses a combination of output and outcome measures to assess the FTC’s fulfillment of its mission.<sup>722</sup> Below is a discussion of metrics used in the FTC’s PAR as well as other indirect measurements of the FTC’s success in fulfilling its mission, such as the outcome of enforcement actions, the deterrent effect and precedential value of those actions, the FTC’s intellectual leadership, and the burdens the FTC places on industry.

## 1. Enforcement Success

The FTC primarily is an enforcement agency. Antitrust and consumer protection enforcement provides benefits to consumers directly in the form of arresting welfare-reducing conduct. The benefits of enforcement also accrue in ways that are hard to measure in a systematic, empirical manner. Cases that deter future welfare-reducing conduct or that clarify or move legal doctrine toward a more welfare-enhancing rule also provide an important benefit. This section examines the strengths and weaknesses of using certain metrics to measure the success of FTC enforcement.

### a. Number of Cases and Win Rates

As discussed in Chapter VI.B.1, panelists generally agreed that focusing on the number of cases filed in a given year is not likely to provide a good indication of the extent to which the FTC is fulfilling its mission to promote consumer welfare. As discussed in Chapter I, the agency ideally should define its mission in terms of ultimate outcomes for consumers, not agency output. Accordingly, agency assessment should focus on actual outcomes, rather than agency output, unless there is a strong demonstrated link between the output, such as number of cases brought, and consumer welfare.<sup>723</sup> Although at one level bringing cases can demonstrate that “the cop is really

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<sup>720</sup> Some commentators have been critical of such GPRA reports issued by agencies, although not the FTC’s specifically, describing them as typically containing “a sunny set of invented statistics designed to reassure their overseers that they are doing fine.” Shapiro & Steinzor, *supra* note 670, at 1744. The result, they argue, is that GPRA “has generated a mind-boggling whirlwind of reassuring statistics, cheerful narrative, and assurances that all is well at whichever regulatory agency is justifying its performance.” *Id.* at 1760. Nonetheless, these commentators offer several principles for improving these types of reports, including a focus whenever possible on “outcomes[s], rather than output[s],” which is consistent with the FTC’s long-run objectives for its PAR. *Id.* at 1770.

<sup>721</sup> FTC PAR, *supra* note 719, at 36-40.

<sup>722</sup> *See id.* at 34.

<sup>723</sup> *See* Ellig, 7/30 DC Tr. at 25-26.

on the beat,”<sup>724</sup> and thereby boost deterrence, unless there is an empirically demonstrated nexus between consumer welfare and the sheer number of cases brought (including merger challenges), this measure alone is unlikely to capture the FTC’s impact on consumer welfare.<sup>725</sup> Further, counting cases is not a completely reliable measure of deterrence benefits because the absence of enforcement activity could signal either significant deterrence or none at all.<sup>726</sup> One panelist starkly explained, for example: “Economists would never say number of cases is a good measure of anything, in particular.”<sup>727</sup> Similarly, another panelist stated with respect to consumer protection enforcement that “the mission of the FTC is not to bring cases. The mission . . . is to stop deception, stop unfairness.”<sup>728</sup>

Although less problematic than counting case filings, primarily focusing on the number or percentage of cases won also would likely fail to provide meaningful information on the effectiveness of the FTC’s enforcement activities. An agency must win some percentage of its cases to preserve credibility,<sup>729</sup> but as one panelist noted, “the function of the agency as an enforcement agency is to get the right answer. It is not to win cases for the sake of winning cases.”<sup>730</sup> A similar point was made with respect to the evolution of the FTC’s approach to advertising – from merely looking for deception cases that could be won in court to considering ways to “get at whatever we think may be deceptive about [the advertising in question] without interfering with or dismantling the benefits of the advertising.”<sup>731</sup> Clearly, winning cases that do not advance, or even hinder, consumer welfare does not further the FTC’s mission.

Further, to the extent that only the closest cases are brought, the agency should not expect to see a near-perfect win rate; a high win rate may signal that the FTC is only challenging easy-to-win cases and thus underdetering bad conduct. For example, two former Bureau of Competition directors noted the value of the FTC’s actions in the patent settlement area, although they have not met with uniform success. As William Baer noted:

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<sup>724</sup> McDavid, 7/30 DC Tr. at 52.

<sup>725</sup> Indeed, if a particular case harmed consumer welfare, its deterrent effect might actually cause further harm.

<sup>726</sup> See Wilks, London Tr. at 33-35.

<sup>727</sup> Rubin, 7/30 DC Tr. at 139. *But see* Peeler, 7/30 DC Tr. at 136 (acknowledging that the number of cases the FTC brings “can mean anything,” but advocating its use as a measure of FTC performance because “my experience is year-in and year-out, at the end of the year, people want to know how many cases you brought”).

<sup>728</sup> MacLeod, 7/30 DC Tr. at 142-43.

<sup>729</sup> See Temple Lang, Brussels Tr. at 39 (“You, obviously, have to win a reasonable proportion of them or your reputation will suffer.”).

<sup>730</sup> Kattan, 7/29 DC Tr. at 158.

<sup>731</sup> MacLeod, 7/30 DC Tr. at 179.

The Schering case also stands for the notion, you can do a lot of good and lose the case. Even though the standard adopted by the Commission was rejected by the Eleventh Circuit, the Supreme Court refused to grant cert, the fact of the matter is that settlements now are scrutinized more carefully by the parties to figure out is this defensible from a competitive point of view by light years over the way they were 10 years ago. The sunlight is on. The spotlight is on. It means that behavior has changed. Even though people perhaps are not going as far as the Commission today thinks is appropriate, the fact of the matter is some of the stuff that was largely indefensible just ain't happening, and it is because the Commission was the cop on the beat.<sup>732</sup>

Susan Creighton echoed this point, explaining that “win, lose, or draw, I think the Commission has done a huge amount of good work in bringing those series of cases.”<sup>733</sup>

Panelists observed that the reason behind a string of losses is likely to be a more important indicator of performance than a low win rate itself.<sup>734</sup> As noted above, if the FTC is losing tough cases involving complex and unsettled areas of law, losses are not likely to be a signal of poor performance.<sup>735</sup> If, however, the FTC is losing easy cases, this would signal a need to improve performance. Further, if losses occur in cases that are “frivolous” to begin with, or cases that rest on legal or factual premises that consistently have been rejected by courts or are out of step with current economic learning, then a high loss rate may signal a need to reassess internal thinking on the type of conduct that violates the FTC Act.<sup>736</sup>

Currently as part of its PAR, the FTC reports the positive outcomes from investigations and cases. Specifically, for consumer protection enforcement, the PAR includes the number of orders or other direct interventions with business that result in a change in business conduct.<sup>737</sup> For competition enforcement, the PAR includes the percentage of positive results for cases the FTC brings, including a win in court, a consent agreement, or abandonment of an anticompetitive transaction after the FTC has

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<sup>732</sup> Baer, 7/29 DC Tr. at 118-19.

<sup>733</sup> Creighton, 7/29 DC Tr. at 119.

<sup>734</sup> See Angland, NY Tr. at 65 (“[A] low winning percentage doesn’t necessarily mean you shouldn’t be bringing cases. . . . It depends on why you’re losing.”).

<sup>735</sup> See *id.*; Boast, NY Tr. at 53.

<sup>736</sup> See Boast, NY Tr. at 52-53 (arguing that the FTC should be more troubled by a hypothetical 20 percent win rate if it were bringing frivolous cases than if it were bringing novel cases like *Rambus* and *Unocal*); Angland, NY Tr. at 65 (“[If losses are because] you say, oh no, entry is hard here and time and again courts say, no, entry is possible here, then I would want to at least think really hard about whether I’m analyzing properly.”).

<sup>737</sup> FTC PAR, *supra* note 719, at 48.

raised antitrust concerns.<sup>738</sup> Importantly, the PAR target for positive outcomes is not 100 percent. Rather, it is set at 80 percent to reflect the fact that if the FTC is selecting cases properly, as discussed above, it is unlikely to achieve a positive outcome in all instances.<sup>739</sup> At the same time, if the FTC carefully chooses when to issue second requests or to open a nonmerger investigation, it also should be expected to win a substantial majority of the cases it ultimately prosecutes. The FTC also measures the percentage of merger and nonmerger investigations that result in one of the following outcomes: Commission authorization of a complaint in federal court or an administrative complaint; a consent agreement; resolution of antitrust concerns without enforcement action; or closing an investigation without subsequent events indicating that the conduct in question harmed competition.<sup>740</sup> Again, this measure is designed to provide an indication of whether the FTC is effectively identifying merger and nonmerger conduct that is likely to cause consumer harm.<sup>741</sup>

### **b. Detering Misconduct**

By demonstrating that it can detect, and will prosecute, violations of the antitrust and consumer protection laws, the FTC reduces the future level of such violations.<sup>742</sup> As several panelists noted, deterrence should be the key criteria when choosing enforcement priorities because the value of deterrence – the discounted present value of all future harmful conduct that does not occur – is likely to swamp the one-time cost of stopping illegal activity.<sup>743</sup> The stronger the deterrent effect, moreover, the larger the avoided damage. Thus, the extent to which particular FTC actions deter future conduct is likely to be a more relevant metric to measure the quality of outcomes than the amount of redress in a particular case.<sup>744</sup> Indeed, one panelist argued that deterrence “should be the holy grail of enforcement[;] enforcement should be operated as far as possible to maximize deterrence.”<sup>745</sup> Although cases implicating large markets can provide large immediate benefits, when the FTC challenges conduct in a small case, the action

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<sup>738</sup> *Id.* at 69.

<sup>739</sup> *Id.* at 67 (“Some cases involve very close issues, on which reasonable minds can and do differ. . . . [T]he agency inevitably must bring cases that pose litigation risks – especially where there is no clear precedent and the FTC is seeking to establish a new legal principle.”).

<sup>740</sup> *Id.* at 62-63.

<sup>741</sup> *See id.* at 60-61.

<sup>742</sup> *See* England, NY Tr. at 40-41 (discussing how the FTC’s lack of ability to fine has a negative impact on the ability of the FTC to deter anticompetitive conduct); Mundt, Paris Tr. at 134-35 (explaining that when selecting cases, a competition agency should never leave a particular market alone or it would leave anticompetitive conduct in such markets undeterred).

<sup>743</sup> As one panelist noted, “The antitrust system, like much of the legal system in this country, is fundamentally a deterrent system. Assuming that works, then the largest effect is in discouraging firms from taking actions that we’ve deemed to be illegal or hopefully deemed them to be illegal because they’re not in the public interest.” Rose, Boston Tr. at 93. *See also* Rubin, 7/30 DC Tr. at 139; Picker, Chicago Tr. at 132-33; Shapiro, Chicago Tr. at 204; Wickelgren, Chicago Tr. at 262; Jenny, Paris Tr. at 64.

<sup>744</sup> *See* Rubin, 7/29 DC Tr. at 139.

<sup>745</sup> Wilks, London Tr. at 33.

nevertheless may have a large deterrent effect if it prevents similar conduct in many other small or large markets.<sup>746</sup>

Unlike investigating a bank robbery, where it is clear that the law has been broken, antitrust investigations often involve determining whether the law has been broken in the first place.<sup>747</sup> When designing and implementing an enforcement agenda, an agency should recognize that in areas where the line between what is legal and illegal is uncertain, enforcement is likely to deter both desirable and undesirable conduct, and the agency should strive to strike the optimal balance between the costs associated with both under- and overdeterrence. As one panelist explained, “[W]hat you really care about is not just how much you punish bad behavior. What you care about is how big the difference is between the expected penalty for good behavior and bad behavior.”<sup>748</sup> When implementing an enforcement program in areas where it may be especially difficult to distinguish procompetitive or neutral conduct from anticompetitive conduct, sensitivity to these types of error cost concerns can militate toward selecting cases involving relatively small markets.<sup>749</sup>

Currently, the FTC does not directly measure the deterrent effect of its actions, noting that it is “difficult, if not impossible, to measure precisely the value (in monetary terms or otherwise) of deterrence . . . .”<sup>750</sup> It does, however, count the number of print media articles (and the circulation of the print media) related to competition and consumer protection activities and also monitors hits on the FTC’s website related to business guidance for FTC enforcement of the competition laws.<sup>751</sup> It is reasonable to assume that deterrence of misconduct (or facilitation of lawful conduct) is a positive function of the extent to which potential lawbreakers are informed about the probability of FTC action or advised of ways to avoid such action. Thus, although not a direct measure of deterrence, these PAR metrics likely are positively related to deterrence in some manner.<sup>752</sup> As the PAR notes in regard to competition activities, “[b]y using these mechanisms to signal its enforcement policies and priorities, the FTC seeks to deter would-be violators of the law. . . . The FTC seeks to make its law enforcement presence visible and its enforcement policies transparent in order to serve its objectives through

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<sup>746</sup> See Wickelgren, Chicago Tr. at 262. See also *Ind. Fed’n of Dentists v. FTC*, 476 U.S. 447 (1986) (involving quick-look application of the rule of reason to dentists’ agreement to withhold X rays from insurers); *S.C. State Bd. of Dentistry*, 138 F.T.C. 229 (2004), *appeal dismissed*, 455 F.3d 436 (4th Cir. 2006) (involving rejection of state action immunity for regulation that prohibited hygienists from performing certain services in school settings in the absence of dentist involvement).

<sup>747</sup> See Wright, Chicago Tr. at 189-90.

<sup>748</sup> Elhauge, Boston Tr. at 43. See also Temple Lang, Brussels Tr. at 106.

<sup>749</sup> See Wickelgren, Chicago Tr. at 262; Wright, Chicago Tr. at 135-36.

<sup>750</sup> FTC PAR, *supra* note 719, at 33.

<sup>751</sup> *Id.* at 49-50 (BCP); *id.* at 74-77 (BC).

<sup>752</sup> A large portion of consumer protection media is aimed at consumers in an effort to better educate them in ways to avoid fraud and deception. Although consumer education surely reduces harm to consumers, only the media mentions of enforcement actions or that otherwise signal the FTC’s enforcement posture are likely to have a deterring effect.

deterrence.”<sup>753</sup> Following is a discussion of some possible direct and indirect means for measuring the extent to which FTC enforcement actions deter unlawful behavior as well as for measuring whether current levels of deterrence are appropriate.

*Direct Measurement of Deterrence.* Ideally, the deterrent effects of Commission actions (as a proxy for welfare effects of those actions) would themselves be measured directly. However, as with the direct measurement of welfare effects, direct measurement of deterrent effects is necessarily difficult because it entails measuring conduct that did not happen.<sup>754</sup> Some outside academics and FTC staff, however, have conducted several studies that attempt to measure the general deterrence effects of the Commission’s advertising substantiation and fraud programs. The methods and results of these studies may be instructive for other attempts to measure (directly or through proxies) the welfare effects of FTC actions.

BCP staff also has attempted to assess the Commission’s general deterrent impact in one area of fraudulent activity: deceptive weight-loss claims. Staff compared the frequency and content of weight-loss advertising in a sample of magazines published in both 2001 and 1992. Although the Commission brought more than 80 cases during this time period, the quantity of weight-loss claims doubled, and claims were much more likely to contain unsupported promises of rapid, dramatic, and permanent weight loss. Staff concluded that the Commission’s prior actions, primarily law enforcement actions, were not sufficient to deter deceptive weight-loss claims (and it urged the media to monitor advertisements for blatantly deceptive “red flag” claims).<sup>755</sup>

Additionally, stock market information can be used to measure directly the deterrent power of an FTC advertising enforcement action against a publicly traded company. Stock market “event” studies compare the movement in the stock price of an FTC defendant – before and after the announcement of a complaint, consent agreement, or final litigated order – with movements in a portfolio of stocks with similar risk over the same time period. This methodology attributes systematic differences in the performance of the target company’s stock value vis-à-vis the benchmark portfolio to the impact of the FTC action on company good will and the effectiveness of its future advertising. In this manner, these event studies test whether a Commission action affects the cost of engaging in deceptive advertising, and hence the deterrent power of FTC enforcement.

The first study examined the stock behavior of 23 companies that were the targets of FTC deceptive advertising complaints (either litigated or settled by consent) from 1962 to 1975, and it found a three percent mean loss in stock value associated with the

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<sup>753</sup> *Id.* at 74. The same would apply to consumer protection activities as well, including enforcement and business education literature.

<sup>754</sup> See *supra* Chapter VII.A; see also Padilla, Brussels Tr. at 80-81; Temple Lang, Brussels Tr. at 77-78.

<sup>755</sup> FTC STAFF, WEIGHT-LOSS ADVERTISING: AN ANALYSIS OF CURRENT TRENDS 28-30 (2002), available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>. See *supra* Chapter VI.B.10 for a discussion of the Red Flag project.

announcement of an FTC complaint.<sup>756</sup> Two subsequent event studies found similar results.<sup>757</sup> Despite a general assumption that FTC administrative cease and desist orders provided little, if any, deterrent impact because they provided firms with a penalty-free “first bite of the apple,”<sup>758</sup> the size of the effect on the stock suggests that stockholders take an FTC order very seriously and that publicity surrounding the order, or perhaps the possibility of future monetary penalties for order violations, was expected to affect future consumer purchase behavior. Thus, these studies suggest that FTC advertising enforcement is likely to have a strong deterrent effect.

At least one study also tested the hypothesis that the FTC’s “reasonable basis doctrine” for advertising substantiation, which the Commission enunciated in its *Pfizer* decision,<sup>759</sup> deterred both harmful and beneficial advertising. The ultimate goal of the reasonable basis doctrine articulated in *Pfizer* is to raise the credibility that consumers can attach to objective claims in advertising without imposing evidentiary burdens that discourage the dissemination of useful information. If the ad substantiation program works as intended, firms that possess a reasonable basis for performance claims will find advertising a more productive mechanism to increase sales. Thus, a correctly set substantiation standard may lead to more advertising. Alternatively, if the FTC has set the substantiation requirements too high, informative advertising may decrease overall.

The study provides a direct test of the extent to which the *Pfizer* decision deterred beneficial advertising, by examining advertising intensity (advertising outlays as a percent of product sales) in all media before and after *Pfizer* for 20 firms selling “search” or “inexpensive experience” goods and 18 firms selling “credence” or “expensive experience” goods.<sup>760</sup> The authors found that, following the introduction of the ad

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<sup>756</sup> Sam Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & ECON. 403 (1981). The author describes the magnitude of this impact as “astounding” given that advertising for the relevant product was at most only one percent of total company sales. Peltzman concludes: “The story the stock market appears to be telling is that an FTC complaint implies essentially a wiping out of the brand’s advertising capital.” *Id.* at 418.

<sup>757</sup> Sauer and Leffler examined the stock market performance of 31 firms that were the targets of ad substantiation cases between 1972 and 1985 and again found that a 3 percent decline in stock value followed announcement of an FTC complaint. Raymond D. Sauer & Keith B. Leffler, *Did the Federal Trade Commission’s Advertising Substantiation Program Promote More Credible Advertising?*, 80 AM. ECON. REV. 191, 192 n.5 (1990). Mathios and Plummer examined 122 advertising cases brought by the Commission between 1963 and 1985. Stock market losses ranged from 2.5 percent for negotiated consent agreements to a cumulative loss of 3.2 percent for litigated cases. FTC BUREAU OF ECONOMICS STAFF, ALAN MATHIOS & MARK PLUMMER, REGULATION OF ADVERTISING: CAPITAL MARKET EFFECTS 37-40 (1988), available at <http://www.ftc.gov/be/consumerbehavior/docs/reports/MathiosPlummer88.pdf>. In contrast, the authors found much smaller or no losses for firms that were the subject of decisions under the self-regulatory program established by the Council of Better Business Bureaus or that were the result of private actions brought under the Lanham Act. *Id.*

<sup>758</sup> See 1969 ABA REPORT, *supra* note 152, at 41.

<sup>759</sup> *Pfizer Inc.*, 81 F.T.C. 23 (1972).

<sup>760</sup> Any increase in advertising credibility from ad substantiation requirements should favor claims that consumers cannot easily evaluate for themselves, either by prepurchase inspection (in the case of so-called “search” goods) or, for inexpensive products, by postpurchase experience (“inexpensive experience” products). Presumably, market forces would police the truthfulness of claims that readily can be evaluated

substantiation program, advertising intensity for the 18 firms in the latter category increased significantly relative to the 20 firms in the former category.<sup>761</sup> The study also gauged the impact of *Pfizer* on entry by new firms; because advertising is of particular value for new products, heavy substantiation burdens could impede entry and slow the growth of new entrants. The authors examined sales data for all new products entering the over-the-counter drug market during the 1967-69 and 1973-75 periods and found that new entrants grew faster and attained their mature sales level faster in the post-*Pfizer* period.<sup>762</sup> This result provides a direct measurement of enforcement effects and suggests not only that *Pfizer* increased advertising credibility, but that it did so without a disproportionate increase in substantiation costs.<sup>763</sup>

Although these studies have some obvious limitations, the results have been interesting and even striking, often running counter to the expectations of the investigators. Further, although acquiring data and identifying the proper benchmark can be difficult, these studies may provide templates for direct measurement of the deterrent effect of other FTC programs.

*Indirect Measurement of Deterrence.* Panelists observed that the deterrent effect of enforcement actions often is seen most vividly in the course of counseling clients,<sup>764</sup> and other agencies have pursued additional, indirect methods of measuring deterrence. One possibility is through survey data. In this vein, the OFT engaged an outside consultant to survey senior U.K. competition lawyers on how many clients abandoned or changed initiatives due to concerns about OFT investigations.<sup>765</sup> The survey revealed

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by consumers, as there would be little gain from making a fraudulent claim that consumers could detect almost immediately. In those situations, presumably, sellers would either make accurate claims about objective characteristics or engage in “puff” advertising intended to grab consumer attention. As a result, the introduction of the ad substantiation program in 1972 might have had little impact on advertising content or intensity for those products. The opposite would be true for products that are expensive and infrequently purchased, or for “credence goods” with performance characteristics that consumers cannot evaluate easily through experience. In such cases, consumers might rely heavily on credible performance claims, and a perception by consumers that such claims have become more credible could encourage firms to advertise more heavily.

<sup>761</sup> Sauer & Leffler, *supra* note 757, at 193.

<sup>762</sup> *Id.* at 198.

<sup>763</sup> It could be fruitful to use whatever historical data are available on advertising content and expenditures, by media and product category, to determine whether there have been any significant changes in the impact of the Commission’s ad substantiation program over the past two decades. Specifically, questions for analysis might include the following: (1) Is there any indication that advertising credibility has suffered over the past 20 years? (2) Have there been any shifts in advertising intensity by type of product? (3) Has there been any reduction in the use of objective performance claims in national advertising? (4) Is it feasible to study the practical effects of particular Commission cases in recent years (analogous to the merger retrospectives performed in the antitrust field)? and (5) Could such analysis yield useful qualitative information on how firms respond to specific advertising substantiation and disclosure requirements?

<sup>764</sup> See, e.g., McDavid, 7/30 DC Tr. at 52-53.

<sup>765</sup> See DELOITTE & TOUCHE LLP, THE DETERRENT EFFECT OF COMPETITION ENFORCEMENT BY THE OFT: A REPORT PREPARED FOR THE OFT BY DELOITTE (2007), available at [http://www.of.gov.uk/shared\\_of/reports/Evaluating-OFTs-work/of962.pdf](http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of962.pdf).

that many companies had altered or abandoned mergers or other conduct because of the concern about possible OFT action. The study concluded that for each merger enforcement action, another merger was deterred.<sup>766</sup> For nonmerger conduct, such as cartel activity and abuses of dominance, the study concluded the ratio was four-to-one or higher.<sup>767</sup> The study has its limits, however. As it notes, the deterrence figures it provides were generally lower bounds because of self-policing that prevents companies from reaching a point at which it becomes appropriate to consult with counsel about the potential illegality of particular conduct.<sup>768</sup> The sample size was small, meaning the data might have significant limitations.<sup>769</sup> Further, the benefits of the deterrent effect of agency actions obviously depend on whether the underlying actions were themselves beneficial – yet another reason for agencies to undertake ex post evaluations and test the benefits of the underlying actions.

The Australian Competition and Consumer Commission also has employed survey data to measure the extent to which its antitrust laws deter illegal conduct.<sup>770</sup> The data collection was divided into two groups: qualitative interviews and quantitative responses. The ACCC interviewed 39 current and former staff of the ACCC to establish ways in which businesses reacted to ACCC enforcement activity and its impact on business compliance. It also collected survey responses from 999 Australian businesses (with a 43-percent response rate) across all industries, filled out by the most senior person responsible for trade practice compliance. The survey revealed that larger businesses exhibited more of the characteristics associated with a higher degree of compliance as they have a greater capacity to comply, feel vulnerable to regulatory enforcement, and are more likely to have had past ACCC interactions. Deterrence levels varied little by industry, with the primary agricultural industries having the lowest levels of compliance. Those with past ACCC interaction saw the cost of compliance as outweighing compliance gains, were more aware of their Trade Practices Act (“TPA”) obligations, and were more likely to rate themselves as higher on their compliance and compliance management activity. Those who admitted TPA breaches perceived the gain of noncompliance as greater than the costs, even if these actions were investigated by the ACCC.

One panelist suggested additional indirect indicators that competition enforcement is having a deterrent effect. For example, the money that companies spend on compliance programs, the size of law firms’ antitrust groups, and the number of business schools that offer programs in antitrust likely are correlated with a deterrent effect on business.<sup>771</sup> On the consumer protection side, some roundtable panelists suggested that

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<sup>766</sup> *Id.* at 6-7.

<sup>767</sup> *Id.* at 8.

<sup>768</sup> *Id.* at 6, 17.

<sup>769</sup> *Id.* at 11.

<sup>770</sup> See VIBEKE LEHMANN NIELSEN & CHRISTINE PARKER, THE ACCC ENFORCEMENT AND COMPLIANCE SURVEY: REPORT OF PRELIMINARY FINDINGS (2005), available at <http://cccp.anu.edu.au/projects/CCCPReport%20Final.pdf>.

<sup>771</sup> Bavasso, Brussels Tr. at 81-82.

the level of consumer complaints could act as a proxy for the level of deterrence.<sup>772</sup> For example, observing a downward trend in certain types of complaints in the Consumer Sentinel database following an FTC enforcement action or education campaign may provide some evidence of a deterrent effect. One must be careful about inferring a causal relationship from such trends, however, because complaints are likely to have a self-reporting bias.<sup>773</sup> Further, as discussed above in the context of merger retrospectives, it may be difficult to identify a proper benchmark level of complaints with which to compare the number of observed complaints.<sup>774</sup>

### c. Direct Impact from Enforcement Actions

As noted above, panelists generally agreed that deterrence should be the primary goal of enforcement, but it is also clear that stopping conduct that is causing immediate harm to consumers is welfare-enhancing. Thus, focusing on cases with large consumer harm is likely to be beneficial to consumers, thus furthering the FTC's mission.<sup>775</sup> For example, several panelists explained that emphasis on enforcement in large sectors of the economy, like supermarkets, health care, and petroleum markets, is appropriate because of the large role these industries play in consumers' lives.<sup>776</sup> Bringing large cases (which is correlated to certain PAR measurements<sup>777</sup>) also can enhance the reputation of the agency, providing, for example, enhanced leverage in negotiations with other parties.<sup>778</sup>

The EC's Directorate General for Competition focuses primarily on cases with large consumer harm.<sup>779</sup> This focus, however, is in part due to the very limited private rights of action in the EU; because private individuals cannot vindicate their own rights, they rely on DG Comp to bring suit to stop the conduct at issue.<sup>780</sup> Given the vibrant market for private litigation in the U.S., however, consumer redress may not be as important a metric for evaluating the success of the FTC.<sup>781</sup> The marginal impact of an

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<sup>772</sup> See Cerasale, NY Tr. at 190-91; Feigenbaum, NY Tr. at 191.

<sup>773</sup> See Greisman, NY Tr. at 211-12.

<sup>774</sup> See *supra* notes 699-710 and accompanying text for a general discussion of difficulties in constructing a hypothetical benchmark. The OFT recently issued a report that looked at whether the complaints lodged in their Consumer Direct database are truly representative of the universe of complaints that consumers have. The report concluded that the database was largely accurate in identifying the biggest areas of consumer harm. Consultation with OFT, Sept. 11, 2008.

<sup>775</sup> See, e.g., Wickelgren, Chicago Tr. at 261-62; Shapiro, Chicago Tr. at 263-64.

<sup>776</sup> See, e.g., Campbell, Chicago Tr. at 136; Drauz, Brussels Tr. at 14; Temple Lang, Brussels Tr. at 63.

<sup>777</sup> PAR measure 2.2.3 provides: "Take action against mergers likely to harm competition in markets with a total of at least \$125 billion in sales over a five-year period, \$25 billion in sales each year." Measure 2.2.5 provides: "Take action against anticompetitive conduct in markets with a total of at least \$40 billion in annual sales over a five-year period, \$8 billion each year." FTC PAR, *supra* note 719, at 39.

<sup>778</sup> See Shapiro, Chicago Tr. at 263-64.

<sup>779</sup> Consultation with DG Comp, Oct. 21, 2008.

<sup>780</sup> *Id.*

<sup>781</sup> See, e.g., Heimler, Paris Tr. at 135 (explaining that the existence of private litigation gives the FTC the luxury of being more selective in the types of cases it takes).

FTC action in a case that implicates a large amount of consumer harm may be small to the extent that there are already strong private incentives to bring antitrust or consumer protection actions. As one panelist noted, when the FTC selects cases, it should prefer “doctrine rather than dollars because if there are a lot of dollars, probably private plaintiffs are going to be ready to do it.”<sup>782</sup> If the harm from conduct that would violate antitrust or consumer protection laws accrues to one or a small number of parties, there may be sufficient incentives for private parties to bring legal action. When a large amount of harm is dispersed over a large number of consumers, however, it may not make financial sense for any single consumer to bring an action, and class actions may be an insufficient tool to vindicate consumer harm.<sup>783</sup> This situation may be especially likely to obtain with respect to consumer protection enforcement.<sup>784</sup>

Currently, the PAR reports an estimate of the savings accruing to consumers from both competition and consumer protection actions.<sup>785</sup> Although the estimated monetary value of harm to consumers that is avoided due to FTC enforcement – necessarily a rough estimate in light of all the issues discussed above – represents an increase in consumer welfare, it does not capture deterrence or precedential effects. Additionally, it does not capture the relative efficiency of the enforcement effort. As discussed above, if a private party (or perhaps a self-regulatory body) were likely to bring a comparable challenge to the conduct in question, agency resources may be better invested elsewhere.

#### d. Precedent

Another benefit of enforcement actions identified by panelists is that they provide guidance and precedent on legal doctrine and the agency’s enforcement approaches.<sup>786</sup>

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<sup>782</sup> Angland, NY Tr. at 64.

<sup>783</sup> See Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy*, Remarks at the Aspen Summit, at 3 (Aug. 19, 2003), available at <http://www.ftc.gov/speeches/muris/030819aspen.shtm>.

<sup>784</sup> *Id.* at 4.

<sup>785</sup> The savings to consumers are based on estimates from staff of the value of goods and services that otherwise would not have been sold due to fraud or deception in the case of consumer protection enforcement and, in the case of competition enforcement, the likely price increases in relevant markets had the conduct been allowed to continue. See FTC PAR, *supra* note 719, at 47 (BCP); *id.* at 70-71 (BC).

The OFT uses a similar methodology to estimate the consumer savings from the direct impact of its competition and consumer protection enforcement programs. See U.K. OFFICE OF FAIR TRADING, POSITIVE IMPACT 07/08: CONSUMER BENEFITS FROM COMPETITION ENFORCEMENT, MERGER CONTROL, MARKET STUDIES AND MARKET INVESTIGATION REFERENCES, AND SCAM BUSTING (2008), available at [http://www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/oft1007.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1007.pdf). To estimate the impact of blocking some mergers, the OFT employs a merger simulation to estimate equilibrium prices and output had the blocked merger occurred. *Id.* at 18. For nonsimulated mergers, it estimates the consumer savings as a weighted average of simulated savings multiplied by the size of the relevant market. *Id.* at 20-21. To estimate the impact of actions that stop anticompetitive conduct, the OFT multiplies the actual or estimated price increase from the conduct by the size of the market, then estimates the likely duration of the conduct absent OFT intervention. The cost of the estimated future harm is discounted to present value. *Id.* at 26-28. The OFT uses a similar methodology to estimate savings from its “Scambusters” team. *Id.* at 14-15.

<sup>786</sup> See, e.g., McDavid, 7/30 DC Tr. at 54.

Cases involving unsettled areas of law are likely to be more risky, and thus associated with lower win rates, but can have large payoffs if they move the law in a direction that enhances competition. Former Chairman Timothy Muris, for example, touched on the Commission’s experience in bringing state action and *Noerr-Pennington* cases, which implicate state-imposed restrictions on competition. Specifically, he pointed to staff’s understandable reluctance to bring the *Unocal* case because it has “*Noerr* problems,” but explained that “[e]veryone across the antitrust spectrum agrees [that state action and *Noerr-Pennington* cases] are good cases.”<sup>787</sup> Although such exemption cases may be more difficult to win than those involving purely private conduct, given the size of likely welfare losses from state-imposed restraints on competition, it is likely that pushing the law in a direction that makes obtaining and imposing state restraints on competition more difficult is likely to provide consumers with significant welfare gains.<sup>788</sup> Further, valuable cases may be brought when direct consumer redress is relatively small. For example, the *Three Tenors* decision laid out a flexible approach to the rule of reason, which the D.C. Circuit ultimately affirmed.<sup>789</sup>

One panelist, however, cautioned that the precedential value of many FTC decisions and prosecutions is limited where they are resolved through consent decrees, rather than litigated cases.<sup>790</sup> Particularly in cases where parties are anxious to avoid litigation, consents may contain theories that would not succeed if litigated.<sup>791</sup>

Court decisions that clarify a murky area of law are valuable to businesses in the form of increased predictability.<sup>792</sup> Accordingly, even an FTC loss that provides clarity to the business community in an unsettled area of law likely provides a benefit.<sup>793</sup> As one panelist noted with respect to the FTC’s standard-setting and Hatch-Waxman cases, “It was very important to know what the courts think about them. That is really a service to consumers and business as well.”<sup>794</sup> Further, if important precedential cases do not involve large markets, there may be little incentive for private enforcement to move the

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<sup>787</sup> Muris, 7/29 DC Tr. at 42 (referring to *Union Oil Co. of Cal.*, FTC Dkt. No. 9305); *see also id.* (“I understand . . . the reluctance of the staff lawyers to go into these exception issues. But why other people in the leadership refrain from going there is a mystery . . .”).

<sup>788</sup> *See* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 994-95 (2005).

<sup>789</sup> *See* *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff’d*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

<sup>790</sup> *See* Campbell, Chicago Tr. at 118-19. Another panelist noted that private cases and those brought by the Department of Justice also are usually resolved by settlement or consent decree. Harrop, Chicago Tr. at 119-20.

<sup>791</sup> *See* Campbell, Chicago Tr. at 128. *See also supra* Chapter VI.B.1.

<sup>792</sup> *See* Drauz, Brussels Tr. at 12 (noting that setting precedent for the purposes of enhancing predictability provides important benefits).

<sup>793</sup> *See* Vickers, London Tr. at 16-17.

<sup>794</sup> Boast, NY Tr. at 53.

law in the correct direction.<sup>795</sup> Thus, FTC action may be necessary to effect the desired improvement in consumer welfare.

Currently, the PAR does not attempt to measure the benefits from establishing better or at least clearer legal rules. Nor did panelists offer any possible metrics. To measure the welfare effects from changes in legal rules directly likely would require methods similar to those used to measure the change in firms' advertising after the *Pfizer* decision.<sup>796</sup>

## 2. Intellectual Leadership

Intellectual leadership broadly refers to the FTC playing a leading role in shaping sound competition and consumer protection policy. The FTC's role as an intellectual leader in competition policy can be traced back to its origins. Congress intended the FTC to guide the courts and the business community at large about what the antitrust laws prohibit and allow, and, to fulfill this mandate, it provided the FTC with broad investigatory powers and intended the Commission to be populated with expert attorneys and economists.<sup>797</sup> As one panelist noted, the FTC is "part of the think-tank of antitrust and competition policy."<sup>798</sup>

Thus, one desirable quality of FTC output is that it demonstrates intellectual leadership,<sup>799</sup> and it can do so in various ways. Commission adjudicative decisions can provide leadership in developing antitrust and consumer protection jurisprudence.<sup>800</sup> The agency can focus attention on new threats to consumers and ways to approach them. For example, although not met with universal success, the FTC's cases involving competition in the pharmaceutical industry demonstrated to policymakers that the type of conduct at

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<sup>795</sup> *But see* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (upholding finding of price fixing against bar associations that published and enforced minimum-fee schedule and declining to create exemption from the antitrust laws for a "learned profession").

<sup>796</sup> *See supra* Chapter VII.B.1.b.

<sup>797</sup> *See* Kovacic, *Quality*, *supra* note 72, at 919-20.

<sup>798</sup> McDavid, 7/30 DC Tr. at 115.

<sup>799</sup> There was considerable debate at the international consultations about whether the U.S. was "losing" influence to Europe. For example, a number of panelists talked about the growth in competition laws based on the European model, attributed in large part to the exportability of its entire legal framework and the ease of transplanting an administrative system. The area in which the U.S. agencies' influence was viewed as strongest, however, was in intellectual innovation, including, for example, the use of economics and analysis of competitive effects. William Bishop explained: "Where the US has continued to succeed and continued to have enormous influence is that it is the source of nearly all the intellectual innovation in the area. If we think of what has happened in the last few years the shift towards economics-based antitrust that is now taken for granted everywhere began in the United States and was first put into practice in the United States. Leniency programs, clarifications of unilateral effects versus coordinated effects, use of simulations in merger and other contexts and nearly all quantitative effects. Nearly everything has come from the United States." Bishop, London Tr. at 153.

<sup>800</sup> For example, as noted in the previous section, the *Three Tenors* decision laid out a flexible approach to the rule of reason. *See supra* note 789.

issue in these cases deserved close antitrust scrutiny.<sup>801</sup> Several panelists also expressed support for the FTC’s recent work in identifying and addressing privacy issues,<sup>802</sup> and, more broadly, panelists suggested that the FTC has demonstrated leadership through its market-based approach to consumer protection enforcement.<sup>803</sup> As discussed in Chapter V.C, research is necessary for intellectual leadership, both internally to guide FTC enforcement decisions in a direction that is likely to improve consumer welfare,<sup>804</sup> and externally for the FTC to use to educate policymakers and courts.<sup>805</sup> As discussed in Chapter VI, the FTC also can exert intellectual leadership through guidelines, advocacy, speeches, and other domestic and international outreach that inform the relevant external constituencies about the FTC’s current thinking in certain areas.<sup>806</sup>

A final tool with which to exercise intellectual leadership is the education of policymakers and consumers about the value of competition. For example, former OPP Director Susan DeSanti explained that in her experience the public and Congress often look at competition in terms of “whether things are fair or not,” rather than understanding the “value of competition in terms of growing the economy, lowering prices, producing innovation, [and] improving quality.”<sup>807</sup> She noted that, “if there is an agency that has a mandate that would include education [on the importance of competition], it is this agency.”<sup>808</sup> In this context, consumer education and formal or informal advocacy demonstrates leadership when it provides consumers and policymakers with answers that may be unpopular, but ultimately are in the best interest of consumers. For example, although proposals aimed at perceived price gouging in the oil and gas industry have been considered by Congress in the past, through reports and congressional testimony, the FTC consistently has demonstrated leadership by advocating against such measures because they ultimately are bad for consumers.<sup>809</sup> Further, by carefully explaining to

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<sup>801</sup> See Boast, NY Tr. at 33-34, 53; Angland, NY Tr. at 64-65; Parker, 7/29 DC Tr. at 118; Baer, 7/29 DC Tr. at 118-19; Creighton, 7/29 DC Tr. at 119; Heimler, Paris Tr. at 98; Stoffel, Paris Tr. at 126; Jansen, Paris Tr. at 137.

<sup>802</sup> See Peeler, 7/30 DC Tr. at 161; Swire, NY Tr. at 180, 204; Feigenbaum, NY Tr. at 214.

<sup>803</sup> See Peeler 7/30 DC Tr. at 133-34. One panelist contended that the FTC needs to play a leadership role in creating greater uniformity in enforcement of state consumer protection laws. See Butler, Chicago Tr. at 19-20, 57-58.

<sup>804</sup> Of course, there may be tensions between litigating cases and conducting research that could undermine those cases. See Salinger, 7/29 DC Tr. at 157-58 (discussing how research on grocery store mergers or petroleum markets may affect enforcement in these areas).

<sup>805</sup> See, e.g., Creighton, 7/29 DC Tr. at 116-17; Kattan, 7/29 DC Tr. at 140-41.

<sup>806</sup> See, e.g., Boast, NY Tr. at 33-34.

<sup>807</sup> DeSanti, 7/29 DC Tr. at 162.

<sup>808</sup> *Id.* at 162-63.

<sup>809</sup> See Leary, 7/29 DC Tr. at 27-28 (“[T]he role that the Federal Trade Commission – the lonely role that the Federal Trade Commission has played in recent years, in urging Congress not to do something stupid, like control the prices of gasoline, is a very proud moment.”); see also FTC POST-KATRINA REPORT, *supra* note 202; FTC, GASOLINE PRICE CHANGES: THE DYNAMIC OF SUPPLY, DEMAND, AND COMPETITION (2005), available at <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf>.

consumers and other external constituents the rationale behind certain FTC actions, the FTC can maintain support for its mission.<sup>810</sup>

Although any measure of intellectual leadership necessarily will be subjective, several proxies for leadership lend themselves to objective measurement. Currently, in its PAR, the FTC measures (1) the number of workshops or hearings it holds,<sup>811</sup> (2) the number of reports and advocacy filings it issues,<sup>812</sup> (3) the number of amicus briefs it files,<sup>813</sup> and (4) the number of consultations with foreign authorities.<sup>814</sup> These measures, however, are all focused on FTC output rather than outcomes.<sup>815</sup>

Panelists suggested some additional outcome-oriented measures for intellectual leadership. For example, the influence of research and competition advocacy can be measured by examining the extent to which these outputs have affected outcomes.<sup>816</sup> Further, the extent to which courts adopt FTC legal theories likely is a useful proxy for FTC leadership in antitrust and consumer protection enforcement. FTC research cited in court decisions or other scholarly work likely is a reflection of the degree to which this output has had a positive effect on consumers.<sup>817</sup> These metrics could be used to determine whether there are problems in the process for developing policy R&D projects, such as producing too few or focusing on the wrong issues.

In evaluating the FTC's work in the international arena, consultation participants proposed a variety of specific indicators for measuring success, including, among others, the quality of contributions to multinational fora (as well as the dissemination of other agencies' contributions to such fora throughout the FTC),<sup>818</sup> the quality and quantity of

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<sup>810</sup> See Venit, Brussels Tr. at 30 ("I think one practical thing may be to begin your educational policy not directed at the [populace] at large, but directed at the politicians themselves, the lawmakers, and try and educate them [as to] the complexities of the problems, what the agency's mission is and why it may not be able to respond to certain [populace] demands and try and deal with it at that level.").

<sup>811</sup> FTC PAR, *supra* note 719, at 54 (BCP); *id.* at 79 (BC).

<sup>812</sup> *Id.* at 55 (BCP); *id.* at 80 (BC).

<sup>813</sup> *Id.* at 55 (BCP); *id.* at 81 (BC).

<sup>814</sup> *Id.* at 56 (BCP); *id.* at 83 (BC). This measure focuses on cases in which the FTC cooperated with foreign authorities, consultations or comments filed with foreign authorities, written submissions to international fora, international events attended, and leadership positions in international competition organizations held by FTC staff.

<sup>815</sup> See, e.g., Calkins, 7/30 DC Tr. at 72 (arguing that measurement of number of competition advocacies is not a particularly good means to determine their effect on consumers).

<sup>816</sup> See *id.* at 117-18.

<sup>817</sup> See *id.*; Ennis, Paris Tr. at 128; Greene, Boston Tr. at 47.

<sup>818</sup> Consultation with the Israeli Antitrust Authority, Aug. 19, 2008. Members of the Israeli Antitrust Authority stated that their agency's international efforts are strengthened by the willingness to involve staff from outside of the international department in international discussions and by the dissemination of information from the international meetings across the agency. In the area of contributions to multilateral fora, there was a recommendation that, to get more substantive contributions, agencies' delegations include more staff who are working on cases. See Reindl, NY Tr. at 104-05.

cooperation received on specific cases,<sup>819</sup> and the willingness of the agency to consult private sector actors and academics in creating best practices.<sup>820</sup>

One panelist also noted that one can measure the extent to which competition advocacy has influenced policy outcomes in directions favored by the FTC through surveys.<sup>821</sup> One study that attempted to assess the FTC advocacy program's impact on regulatory outcomes from 1985 to 1987 found that 39 percent of comment recipients reported that the comments were at least "moderately effective," meaning that "the governmental entity's actions were totally or in large part consistent with at least some of the FTC recommendations, and that any action taken was largely or partly because of those recommendations."<sup>822</sup> The author concedes, however, that this "does not establish that the FTC effect on those decisions improved them; that is what cannot be measured."<sup>823</sup>

A more recent survey concerning advocacy filings from 2001 to 2006 by the FTC's Office of Policy Planning sought to improve on the methodology employed in the 1985-1987 survey. For example, the survey solicited input not only from the advocacy requestor but also others involved in the decision-making process, including those opposed to the position articulated in the FTC advocacy. Further, the survey included questions designed to assess the extent to which the FTC affected the outcome of the legislative or regulatory process. This survey found that 53 percent of respondents agreed that the outcome of the regulatory process was largely consistent with the FTC position, 94 percent of respondents said that the FTC comment was considered, and 54 percent of respondents (and 79 percent of those respondents who had an opinion) believed that the FTC comment influenced the outcome. Further, 81 percent of respondents answered that the fact that the comment came from the FTC caused them to give it more weight than they otherwise would have.<sup>824</sup>

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<sup>819</sup> Consultation with ACCC, Oct. 2, 2008.

<sup>820</sup> DC Consultation on International Issues, Nov. 6, 2008; Korsun, NY Tr. at 139. The FTC was commended by one roundtable panelist for its work with nongovernmental advisors. *See* Blechman, NY Tr. at 136.

<sup>821</sup> *See* Ellig, 7/30 DC Tr. at 27-28. In fact, the FTC is considering whether to measure the outcome of advocacies as part of future PARs. *See* FTC PAR, *supra* note 719, at 34.

<sup>822</sup> Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L.J. 379, 391 (1989). Another 11 percent of the survey respondents found the comments to be "slightly effective," meaning that "the governmental entity's actions were to a small degree consistent with at least some of the FTC recommendations, and that any action taken was largely or partly because of those recommendations." *Id.* Additionally, the author found that 47 percent of respondents gave the comments "substantial weight because it came from the FTC." *Id.* at 392. In 1989, a virtually identical survey was sent by the Director of the FTC's Advocacy Office to recipients of comments dated June 1, 1987 through June 2, 1989. The responses to this second survey were consistent with those from the first.

<sup>823</sup> *Id.* at 400.

<sup>824</sup> United States, *Note for OECD Roundtable on Evaluation of the Actions and Resources of Competition Authorities*, at 13-14 (May 25, 2007), available at <http://www.ftc.gov/bc/international/docs/evalauth.pdf>. *See also* Deborah Platt Majoras, *A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program*, Keynote Address, Current Topics in Antitrust Economics and Competition Policy, Charles River Associates (Feb. 8, 2005), available at

### 3. Transparency and Guidance to Business and Consumers

Several panelists noted that the business community greatly values prospective guidance from the Commission on its current enforcement views in the conduct and merger areas.<sup>825</sup> Providing guidance, moreover, is consistent both with President Wilson’s original vision for the agency<sup>826</sup> and with the FTC’s “special mission in the policy area,”<sup>827</sup> which is to act as the preeminent competition and consumer protection policy authority.<sup>828</sup> This guidance comes not only from formal guidelines and industry guides, but also from speeches, advisory opinions, and closing statements, and it can reduce total societal costs by allowing businesses to “get it right” in the first instance, rather than having to engage with the Commission.<sup>829</sup>

As noted in Chapter VI.B.5, notwithstanding criticisms levied against agency guidelines, many roundtable participants urged the Commission to produce more formal business guidance in the form of guidelines and guides.<sup>830</sup> As one panelist put it, the “appetite of the private bar for guidance[ and] guidelines is inexhaustible.”<sup>831</sup> Others generally lauded the Commission’s use in recent years of its complaints and settlement agreements to provide information to the business community and other enforcement agencies as to why certain practices were violations of the FTC Act.<sup>832</sup> As one panelist explained:

The value of the FTC has not just been as catalyst to legislative change, advocacy, promoter of removal of government restrictions on competition, but also it has just made the law work better by bringing cases, clarifying its view of the law, getting some wins, occasionally losing – but that is all part of the process – but indirectly making it

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<http://www.ftc.gov/speeches/majoras/050208currebttopics.pdf> (describing selected advocacy successes and comparing substantial benefits to limited costs of advocacy program).

<sup>825</sup> See, e.g., Leary, 7/29 DC Tr. at 13-14; Bernstein, 7/29 DC Tr. at 17; Baer, 7/29 DC Tr. at 85; Bowie, 7/29 DC Tr. at 86; A. Schwartz, 7/29 DC Tr. at 204-07; Fenton, 7/29 DC Tr. at 220; Greenbaum, NY Tr. at 182-83. See *supra* Chapter VI.B.5 for a discussion of some of the principal means by which the FTC provides guidance.

<sup>826</sup> See *supra* text accompanying note 576.

<sup>827</sup> McDavid, 7/30 DC Tr. at 54.

<sup>828</sup> See Kovacic, *Quality*, *supra* note 72, at 918 (noting the original Congressional intent that the FTC be the preeminent competition policy authority).

<sup>829</sup> See Baer, 7/29 DC Tr. at 85. See also McDavid, 7/30 DC Tr. at 54-55; Bernstein, 7/29 DC Tr. at 17-18.

<sup>830</sup> See, e.g., Cerasale, NY Tr. at 201-02 (suggesting that there be more guidance for small businesses); Greenbaum, NY Tr. at 204-05.

<sup>831</sup> Fenton, 7/29 DC Tr. at 220.

<sup>832</sup> See, e.g., Bowie, 7/29 DC Tr. at 86-87.

much easier for others, including private parties themselves to enforce the law.<sup>833</sup>

Transparency, or the ability of the outside to look into the FTC's decision-making process and the FTC's ability to communicate to the public, also promotes the FTC's ability to provide guidance to the business community. A careful explanation of why certain FTC actions are in consumers' interests can provide valuable information to the business community and can build external support for these policies.<sup>834</sup> As one panelist noted, "guidelines are an exercise in agency transparency."<sup>835</sup> A clear understanding of how the FTC is likely to treat a transaction or business practice increases predictability, which is likely to reduce firms' costs by making it easier for them to plan for compliance.<sup>836</sup> It also is likely to economize on agency enforcement resources by promoting deterrence and voluntary compliance with the antitrust and consumer protection laws.<sup>837</sup>

Panelists also observed that transparency in decision making can force agencies to produce better outcomes than they otherwise would: "If you're committed to having to explain yourself publicly in any kind of detail, you're going to do a better job ahead of time."<sup>838</sup> Similarly, another panelist observed that an agency may be more careful in its analysis of a particular matter if it anticipates issuing a closing statement.<sup>839</sup> Further, transparency can have the indirect effect of improving policy by allowing a public discussion on a complex issue.<sup>840</sup> Finally, transparency also can have international benefits by providing guidance to foreign competition and consumer protection authorities.<sup>841</sup>

When assessing the FTC, it is appropriate to examine the extent to which its actions have provided guidance both to the business community and to fellow

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<sup>833</sup> Vickers, London Tr. at 16-17.

<sup>834</sup> See Temple Lang, Brussels Tr. at 39-40; Boast, NY Tr. at 33-34.

<sup>835</sup> Campbell, Chicago Tr. at 143.

<sup>836</sup> See Lowe, *supra* note 689, at 2; see also ABA TRANSITION REPORT, *supra* note 11, at 8; AMC REPORT, *supra* note 682, at 65. Lowe notes the tradeoff between providing greater predictability and the need to deal with each case on its particular facts: "Based on empirical evidence, some structures or conducts have almost always produced outcomes which are harmful to competition and consumers. As a result it may be possible to establish some clear ex-ante rules which offer a high level of predictability. However, where past evidence is mixed, the most that can be done to provide a degree of predictability is to indicate what assessment methodology will be used." Lowe, *supra* note 689, at 2.

<sup>837</sup> See, e.g., Lowe, *supra* note 689, at 9 ("Communicating effectively about [DG Comp's] work has a preventive effect. We can explain the law and highlight the penalties for not respecting the law.").

<sup>838</sup> Heyer, 7/30 DC Tr. at 109-10. See also McDavid, 7/30 DC Tr. at 111; AAI TRANSITION REPORT, *supra* note 150, at 210.

<sup>839</sup> See Wright, Chicago Tr. at 130.

<sup>840</sup> See Heyer, 7/30 DC Tr. at 64-68, 109.

<sup>841</sup> See ABA TRANSITION REPORT, *supra* note 11, at 8.

enforcement agencies and private parties enforcing the antitrust or consumer protection laws. Currently, the PAR measures the extent to which the public accesses relevant consumer protection and competition information from the FTC's website.<sup>842</sup> Although no panelists offered a way to measure transparency, one possible metric would be to count the number of FTC outputs (for example, speeches, advisory opinions, and closing statements) that provide the external community with an insight into how the FTC arrives at its decisions. Although this metric clearly is focused on output rather than outcome, in the case of transparency, output and outcome largely merge – the focus of transparency is on FTC output.

The FTC also provides guidance to consumers to reduce the incidence of fraud and deception. This type of consumer protection education is distinct from that related to competition. Unlike in the case of antitrust violations, consumers can take actions to reduce the probability of becoming a victim of fraud and deception. Thus, targeting messages directly to consumers to inform them of these actions can reduce the occurrence of fraud and deception. Consumer education has evolved over the past 20 years from a relatively minor adjunct to the consumer protection program to a major tool in addressing consumer protection issues.<sup>843</sup> This change reflects the recognition that, in some areas, changing consumer behavior may be more effective than bringing enforcement actions. For example, the fraudulent practice of “phishing” for financial account information becomes less lucrative to the extent that consumers opt not to respond to such emails or telephone calls.<sup>844</sup> To address the problem of identity theft – where the fraud may be a criminal act perpetrated by one individual – the Commission has prepared an array of educational materials designed to assist not only the victimized consumers, but also the entire network of entities that may play a role in deterring, detecting, and defending against the fraud; these include law enforcement agents, businesses, and organizations in a position to educate their membership.

Currently, under its PAR the FTC tracks the number of consumer protection messages accessed online or in print (both in English and in Spanish) and the number of times print media publishes articles referring to FTC consumer protection activities and the circulation of the media that publish those articles.<sup>845</sup> A more outcome-oriented metric that captures the extent to which these materials actually lead to beneficial changes in consumer behavior would be preferable, but likely very difficult to implement in all cases.<sup>846</sup> However, perhaps a few discrete case studies that examine the incidence of certain types of fraud or deception – using survey data and data from the Consumer Sentinel database – following the implementation of a consumer education program could establish the relationship between consumer education and fraud and deception for

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<sup>842</sup> FTC PAR, *supra* note 719, at 50-51 (tracking access to consumer and business education concerning consumer protection matters); *id.* at 82 (tracking access to competition-related materials).

<sup>843</sup> See Baker, Chicago Tr. at 60. See also *supra* Chapter VI.B.6.

<sup>844</sup> See Peeler, 7/30 DC Tr. at 195.

<sup>845</sup> FTC PAR, *supra* note 719, at 50-51.

<sup>846</sup> See *id.*

evaluation purposes. Further, former Commissioner Yao suggested that the FTC could evaluate the effectiveness of consumer education through a field examination. Specifically, his proposal involved the FTC running a mock false advertisement and then introducing a consumer education campaign directed at this specific type of deceptive advertising. A reduction in the number of consumer inquiries about the product after the education campaign would serve as a measure of its effectiveness.<sup>847</sup>

#### 4. Burdens on Industry and Timeliness

As noted earlier in this chapter, the FTC mission calls for it to prevent business practices that are anticompetitive or unfair or deceptive without “unduly burdening business activity.” Thus, FTC actions also should be assessed by the extent to which they saddle industry with unnecessary monetary and time costs. Panelists, for example, commented on the burdens that FTC investigations placed on their clients in terms of document production.<sup>848</sup> Several panelists also addressed the length of time it often takes the FTC to conduct an investigation.<sup>849</sup> While dilatory tactics by respondents may account for some delays in Commission investigations,<sup>850</sup> delays at the agency can place unreasonable burdens on the business community and can adversely affect the FTC’s credibility.<sup>851</sup>

In addition to the direct costs associated with lengthy investigations, there are indirect costs. First, if investigations into whether certain conduct violates Section 5 linger without resolution (either issuance of a complaint or closing of the investigation), the uncertainty is likely to chill what may be procompetitive conduct.<sup>852</sup> Second, there may be a negative relationship between the quality of work involved in a case and the length of the investigation. As one panelist explained, “When things just bog down and drag on, the quality of the fact finding and the quality of the legal analysis, I think declines as well.”<sup>853</sup>

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<sup>847</sup> See Yao, Boston Tr. at 126.

<sup>848</sup> See, e.g., Creighton, 7/29 DC Tr. at 96-97, 109; Bowie, 7/29 DC Tr. at 110-11.

<sup>849</sup> See, e.g., Creighton, 7/29 DC Tr. at 94; Bowie, 7/29 DC Tr. at 94-95.

<sup>850</sup> A target of an FTC investigation has an incentive to let such investigation go on indefinitely – particularly if the target has reason to believe that the investigation likely will not result in any enforcement action on the part of the agency.

<sup>851</sup> See Baer, 7/29 DC Tr. at 91; see also McDavid, 7/30 DC Tr. at 112-13 (explaining that allowing a nonmerger investigation to last five years is “certainly not good government”); ABA TRANSITION REPORT, *supra* note 11, at 9-10 (noting the burden associated with long investigations and suggesting that the agencies commit to a time line).

<sup>852</sup> See Wright, Chicago Tr. at 190 (“the idea that keeping these investigations open, doesn’t have some sort of chilling effect on what could be procompetitive conduct strikes me as not plausible and it’s at least a factor that should weigh into these determinations”).

<sup>853</sup> McChesney, Chicago Tr. at 124. This deleterious effect may arise because as cases drag on, there is often turnover in staff, which leads to “an awful lot of things [having to be] started over again both on the fact-finding side and to the extent that there has been any legal work completed, reviewing that again.” *Id.*

Although the FTC currently provides no measurement of costs imposed on the business community, one possibility suggested by a panelist would be to report estimates of the financial burdens of second requests and other investigation demands as well as the time spent investigating matters or litigating in Part III.<sup>854</sup> As one panelist noted, if the FTC were to begin regularly reporting the length of case investigations, it not only would apprise the public of the FTC's performance but also likely would create pressure to resolve issues more quickly than they are currently.<sup>855</sup>

### C. Responsiveness to Core Constituencies

The FTC has several constituencies; chief among them are Congress, consumers, and business. As discussed in Chapter I.C, lack of external support from core constituencies can jeopardize the legitimacy of the agency. Part of maintaining constituency support involves paying close attention to the views of external stakeholders to calibrate the FTC's approach to protecting consumers and markets. For example, in periods when the FTC was unresponsive to congressional and business concerns, it lost its ability to operate effectively.<sup>856</sup> One panelist also noted the growing importance of reliance on networks of government agencies and external stakeholders to "share and be involved in activities" to solve problems.<sup>857</sup> More generally, the ability of an agency to understand the problems that are garnering political attention and to demonstrate that the agency is "part of the solution" rather than "part of the problem," is a key component to long-term success.<sup>858</sup>

Currently, the FTC measures its responsiveness to consumer protection complaints in the PAR.<sup>859</sup> It also measures the holding of, and substantial participation in, workshops that involve both competition and consumer protection issues.<sup>860</sup> In a broader sense, workshops are a means by which the FTC demonstrates a willingness to respond to, and learn from, constituencies about pressing issues. Although there likely is no objective measurement of responsiveness to constituencies in most areas, internal evaluation of the extent to which the FTC communicates with constituencies also may be a useful metric.

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<sup>854</sup> See Peeler, 7/30 DC Tr. at 137-38.

<sup>855</sup> See Calkins, 7/30 DC Tr. at 113.

<sup>856</sup> See, e.g., WILSON, *supra* note 16, at 207-08 (explaining that Chairman Pertschuk's activism in certain areas failed in part because it "aroused the opposition of broad segments of the business community"); Kovacic, *Quality*, *supra* note 72, at 922-23 (explaining that Pertschuk "misjudged the changing political character of Congress, which grew increasingly conservative in the late 1970s, as the FTC pursued an unprecedented collection of ambitious antitrust and consumer protection measures").

<sup>857</sup> Breul, 7/30 DC Tr. at 41-42. See also Bernstein, 7/29 DC Tr. at 56-57 (noting that communication and consultations with outside constituencies was helpful in anticipating controversies).

<sup>858</sup> See Breul, 7/30 DC Tr. at 34-35.

<sup>859</sup> FTC PAR, *supra* note 719, at 45.

<sup>860</sup> *Id.* at 54 (BCP); *id.* at 79 (BC).

Some panelists raised concerns that constituents do not always demand welfare-enhancing action from the FTC. For example, as noted above, some panelists observed that neither consumers nor policymakers necessarily fully appreciate the dynamics of, and benefits from, competition in complex markets.<sup>861</sup> Further, as one panelist noted, interest groups “are not representing the interest of consumers generally. They’re representing a particular interest.”<sup>862</sup> Thus, before taking actions in response to requests from interest groups, the FTC must “calibrate[] what its mission is and recognize[] whether what is being requested of the Commission is consistent with stopping fraud, stopping deception, or stopping unfairness.”<sup>863</sup>

Accordingly, taking actions to satisfy the policy demands of constituencies may not necessarily provide a good measure of whether the FTC is taking actions that advance consumer welfare. Constituencies may ask for outputs that suit their self-interest, which does not necessarily correlate to consumers’ interest. Because the FTC cannot operate effectively without external constituent support, however, there can sometimes be a tension between intellectual leadership – which may require taking positions that are unpopular with political overseers and consumers, but are based on agency expertise of what is in consumers’ best interest – and responding to the desires of core constituents. As one panelist noted, when these circumstances arise, it is essential for a competition agency to bring along its constituencies as it acts to ameliorate this tension.<sup>864</sup> Part of this exercise involves being accessible and willing to entertain a constituency’s particular policy demand. It does not, however, require acquiescence to every such demand. As noted in Chapter I.C, it is important to distinguish between long-term support for the agency’s mission – which is necessary – and unanimous support for every agency action – which is not.<sup>865</sup>

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When assessing the characteristics of agency output, the FTC should stay focused on how its actions impact consumer welfare. In some instances, welfare changes can be measured directly, but in most cases direct measurement will be impractical. Consequently, evaluation of FTC actions often will focus on some mixture of output and outcome measures to proxy for direct consumer impacts.

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<sup>861</sup> See, e.g., DeSanti, 7/29 DC Tr. at 161 (“we operate in a society where the value of competition is not well understood”); Salinger, 7/29 DC Tr. at 163 (with regard to gasoline prices, “the public . . . did not understand the workings of [a] competitive marketplace and they were writing their congressmen”); Davis, 7/29 DC Tr. at 175-76 (noting that one of the challenges the FTC faces is educating congressional stakeholders on the value of the agency’s competition mission).

<sup>862</sup> MacLeod, 7/30 DC Tr. at 144.

<sup>863</sup> *Id.*

<sup>864</sup> See Hill, Paris Tr. at 107. See also Venit, Brussels Tr. at 35-37.

<sup>865</sup> See Muris, *Principles*, *supra* note 17, at 167 (having support of external constituencies for an agency’s mission “does not mean that the agency’s mission must be ‘popular’ or that the constituents must support every particular agency action”).

Some proxies, however, have a closer nexus with welfare changes than others. The raw number of cases brought is at best a limited metric to evaluate FTC enforcement actions. Further, a focus on the number of wins is likely to be similarly uninformative – a large number of wins is likely to signal that the Commission is bringing only easy cases and that more problematic conduct remains underdeterred; a smaller number of wins could mean that the agency was doing a poor job of litigating, but also could mean that the agency was bringing challenging cases. Thus, evaluators should pay attention to the extent to which the FTC is bringing the proper mix of cases to maximize its positive impact on consumer welfare. This mix will include cases in large markets that vindicate substantial consumer interests in the short run, but also cases that are likely to have large, long-run deterrent and precedential value. Determining the optimal mix of cases to use as a benchmark for the actual mix of cases is likely to be somewhat subjective.

Empirical study of the relationship between FTC enforcement (and other) actions and market outcomes may guide this endeavor. For example, evaluating the deterrence effects of enforcement actions targeting anticompetitive conduct may yield useful information to guide future enforcement efforts. Because consumers can take actions to reduce the incidence of fraud and deception, consumer education can be an effective adjunct to enforcement in promoting consumer protection. Evaluating the success of consumer education in reducing fraud and deception may be difficult in every circumstance, but a few carefully designed studies may provide valuable information.

FTC actions also should be evaluated to determine whether they demonstrate intellectual leadership in the areas of competition and consumer protection policy. Commission cases can lead the way in developing legal norms. Further, it is important for the FTC to engage in competition and consumer protection policy R&D to calibrate the fit between FTC actions and consumer welfare and to inform courts and policymakers in their decisions. The extent to which courts, policymakers, and academics follow the FTC's lead in these areas is an important evaluative criterion. Educating the public and policymakers on the benefits of competition also is important. Thus, any evaluation should measure the extent to which consumers use FTC competition-promoting materials and the extent to which FTC advocacy influences policy outcomes.

The external community values guidance from the FTC, and the agency should strive to make decisions more transparent to improve policy determinations. Any evaluation of FTC actions should ask, for example, whether the FTC adequately publicizes its actions and whether it effectively conveys policy norms to industry and the courts.

Evaluations of FTC output also should measure the extent to which FTC actions place unreasonable costs on the business community, both in terms of money and time. Such measurement will inform Congress, industry, and the public and also likely will enhance internal incentives to reduce burdens the FTC places on businesses. When developing a metric, it is important to develop appropriate benchmarks for both financial and time burdens, which are likely to vary by action. Potential timeliness metrics might

focus on the appropriate time to process investigations or from filing an administrative complaint until a final Commission decision.

Finally, being open and responsive to core constituencies' concerns is crucial. Absent external support for its mission over time, the FTC cannot operate effectively. At the same time, it is important to distinguish between cultivating external support for the mission by demonstrating a willingness to take seriously constituency concerns, and attempting to garner unanimous support for every agency action. Further, the agency should be cognizant of the potential tension between intellectual leadership and responsiveness to constituency demands. When these circumstances arise, the FTC can ameliorate this tension by engaging in outreach to develop support from its constituencies for its policies.

Answering the fundamental question of how to determine whether the FTC is successful requires understanding the agency's mission, the tools it can employ, how it uses those tools, and how it should measure success. Measurements and metrics are useful and should be carefully designed and routinely applied. It is also important to recognize, however, the intangible nature of the perception of success. As one roundtable panelist offered, "[W]hen you are trying to estimate how well you are doing, there are things that count that can't be counted and there are things that you can count that don't count."<sup>866</sup> This project's deep inquiry into how the agency should examine itself and its actions is meant to identify and examine the quantifiable and the intangible characteristics of success and serve as a guide for the FTC as it approaches its one hundredth anniversary in 2014.

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<sup>866</sup> Marsden, *London Tr.* at 121.

## **PART 4: CHAIRMAN’S RECOMMENDATIONS**

Based on the preceding discussion of the institutional arrangements by which the Commission performs its responsibilities (in Chapters I-VI), as well as the means for measuring the effectiveness of the agency’s performance (in Chapter VII), following are recommendations for consideration by future leaders of the Federal Trade Commission. These proposals are offered with the expectation that many measures will require continuing effort over a number of years. A larger objective is to build a cultural norm that sustains regular, substantial investments in long-term agency capacity. In all of the matters addressed below, the FTC should use a combination of self-study, consultation with external organizations, and benchmarking with other competition authorities.

### **Mission**

With internal and external constituencies, the FTC should continue to build a consensus that the core purpose of the agency is to promote the well-being of consumers. The Commission should assess each proposed initiative by its capacity, among other ends, to improve the range of goods and services available to consumers and to strengthen the capacity of consumers to make well-informed choices among those alternatives.

In its Annual Report and in other statements, the Commission regularly should state its goals and the means with which it intends to achieve such goals. Where possible, the Commission should define its aims in terms of desired outcomes (such as enhancements in economic performance or consumer welfare) rather than in terms of outputs (such as the number of new law enforcement matters).

The Commission should engage in regular, periodic consultations with external constituencies – including legislators, other public agencies, consumer groups, business organizations, academic institutions, and legal societies – about the aims that should motivate the agency’s choice of programs and about the interpretation of its authority. Useful means to this end would include:

- Workshops, seminars, and hearings that focus on the conceptual framework for applying the agency’s authority. One recent illustration is the workshop the Commission conducted in October 2008 on the use of the agency’s power to challenge unfair methods of competition under Section 5 of the Federal Trade Commission Act.
- Increased use of blogs and similar tools to foster a conversation about the agency’s aims and programs.

The Commission should engage in regular internal consultations with its administrative professionals, attorneys, and economists to discuss the agency’s objectives and the selection of measures to accomplish its goals. In addition to measures already

taken, the agency should:

- Expand the use of policy review sessions in which the Commission meets in plenary sessions with the agency staff to examine specific issues.
- Hold regular town hall meetings, which enable the agency's entire staff, or major operating units, to gather as a group to discuss the agency's aims and programs.
- Increase the use of internal protocols that help guide the staff with respect to the agency's aims and the formulation of projects to achieve them.

The Commission should continue its dialogue with Congress about the utility of existing limits on its jurisdiction. For example, the sensibility of exemptions governing common carriers, not-for-profit entities, and financial services warrant close examination. To leave existing restrictions in place will undermine the capacity of the agency to deliver effective, integrated policy solutions to important competition and consumer protection problems.

### **Agency Structure and Operations**

The Commission should engage in regular assessments of whether its structure and operational procedures can be modified to improve its delivery of effective programs.

The Commission should augment existing efforts to improve communications across the agency generally and among its operating units. These efforts might include:

- Providing a clear statement of the agency's aims and explanations about how individual programs are linked to the attainment of those aims.
- Expanding efforts, through small group discussions and larger meetings, to discuss policy initiatives with the agency's staff.
- Creating an internal "wiki" or similar tool for accumulating knowledge about past and present agency activities.

The agency should explore ways to integrate knowledge and expertise more effectively across bureaus. This would include:

- Deeper integration of economic analysis into the formulation of competition and consumer protection initiatives.
- More extensive development of integrated competition and consumer protection responses to specific issues.

The agency should expand existing efforts to manage litigation and nonlitigation initiatives by measures such as:

- Setting and reviewing timetables for the completion of all major projects.
- Refining internal electronic databases to determine the status of each project.

## **Resources**

The Commission should explore additional ways to preserve and enhance its human capital. Means to this end might include:

- Intensification of existing efforts to devise personal development plans for each employee.
- Expansion of internal and external training opportunities.
- Greater movement of staff across operating units as a way of expanding the range of experiences within the agency.

The Commission should continue to develop a capital budget that provides periodic increases in outlays for information management and communications systems. The purpose of these increases is to ensure that the agency has state-of-the-art capability to address the full range of its technology needs.

The agency should continue to engage Congress in a discussion about the possibility for augmenting the existing federal pay scale to enable the FTC to make salary-based departures to the private sector less frequent. There is serious question about whether the Commission's capacity, and that of other public agencies in the United States, can be sustained at acceptable levels if compensation levels are not increased substantially.

## **Relationships**

The Commission should expand its efforts to share expertise and develop common programs with the Antitrust Division of the Department of Justice. Specific measures might include:

- Development of working groups that will meet regularly to share experience and discuss superior techniques for responsibilities such as merger review.
- Devising a regular program of staff exchanges for attorneys and economists.

- Preparation, in consultation with congressional committees, of a new agreement to govern the clearance of law enforcement matters.

The Commission should expand its formal and informal efforts to build networks with other public institutions within the United States. Means to this end might include:

- Formulation of working groups with individual federal agencies with related policymaking responsibilities whose exercise affects the attainment of the Commission's competition policy and consumer protection goals. Memoranda of understanding might be prepared to structure these and related measures.
- Expansion of the scope of cooperation with state competition and consumer protection authorities. Focal points for expanded cooperation might include common training exercises, broader collaboration on case development, and the pooling of experience in areas of shared responsibility.
- Establishment of a domestic competition network and a domestic consumer protection network that would provide a forum for discussion and cooperation for officials in public agencies in the United States.

The Commission should continue and refine its commitment of resources to cooperate with foreign competition and consumer protection authorities in the context of bilateral, regional, and global networks. Focal points for cooperation might include:

- In the context of bilateral relationships, greater common efforts to cooperate on merger and nonmerger cases, to devise and carry out research projects of common interest (such as the evaluation of enforcement decisions taken in matters reviewed by both jurisdictions), to prepare workshops and seminars, and to conduct routine exchanges of staff.

The Commission should continue to develop links to academic research institutions whose work is related to the agency's responsibilities.

The Commission should designate FTC officials to serve as liaisons to nongovernment bodies such as consumer groups and industry associations.

### **Strategic Planning**

The Commission should consider refinements to the existing collection of mechanisms by which it sets priorities and chooses programs. The agency should progress toward the refinement of a framework that analyzes proposed FTC litigation and nonlitigation matters according to their likely benefits for consumers, their potential impact on doctrine or other aspects of public policy, their cost in resources and time, and their risk. The agency should view all of its matters as part of a portfolio that should be

balanced across low-, medium-, and high-risk activities. Means to this end might include:

- Expansion of the role of the Office of Policy Planning (an office outside the major bureaus) to serve as a focal point for the preparation of materials that the Commission can use to establish the agency's strategic plan.
- Regular, periodic public consultations to obtain views about the appropriate choice of the agency's competition and consumer protection programs.
- Development within the Bureau of Competition and the Bureau of Economics of a formal planning framework comparable to the mechanism used by the Bureau of Consumer Protection.

### **Policy Research and Development**

The Commission should consider the refinement of existing processes for formulating and carrying out its research program. Measures to this end might include:

- Formal consideration, as part of the annual budgeting process, of the amount of FTC resources to be dedicated to theoretical and applied research projects.
- Replication within the Bureaus of Competition and Consumer Protection of a research planning committee now used by the Bureau of Economics.
- Use of an agency-wide mechanism – such as the Office of Policy Planning – to serve as a clearinghouse for agency research activities.

The Commission should make the use of its Section 6(b) authority a routine element of its research program, including the initiation in each annual budget cycle of one or more studies that employ this policy tool.

The Commission should continue to devote substantial resources to public consultations as policymaking tools. In its role as a convener of hearings, workshops, seminars, and town hall meetings, the Commission has considerable capacity to learn of important legal and economic phenomena and encourage useful public discussion about important issues.

### **Resource Deployment**

The Commission's main operating units should devise principles that spell out the criteria the staff should use in assigning priority to different enforcement and nonenforcement projects.

The Commission should consider setting internal, bureau-specific deadlines for investigations and regularly should hold meetings to discuss progress achieved in individual matters.

The Commission should strive to issue a statement that explains why it has closed a matter that involved a significant investigation.

### **Measuring Effectiveness**

The Commission should continue to improve the measures by which it can assess its effectiveness with respect to all areas of its operations. The agency's goal should be to imbed an ethic of self-assessment and continuous improvement. Focal points for this effort should include means for assessing the agency's use of enforcement and nonenforcement tools, the completeness and quality of information it provides about its activities, its guidance to external constituencies, the timeliness of its operations, the justifications for burdens that it imposes on business operators, and its openness to proposals offered by constituencies outside the Commission.

Commission staff should identify in memos recommending agency actions how the effectiveness of those actions, if they came to fruition, might be evaluated.

The Commission should prepare publicly available data sets that report on its activities over time.

The Commission should continue to refine its GPRA performance measures to focus on outcomes directly and, as a second-best solution, to devise output measures that are likely to serve as good proxies for desired outcomes.

The Commission should maintain datasets that track the time taken to perform routine administrative tasks.

## APPENDIX 1 – LIST OF FTC AT 100 ROUNDTABLE PARTICIPANTS

### Washington, D.C. Roundtable (July 29-30, 2008)

William Baer	Partner, Arnold & Porter Former Director, FTC Bureau of Competition
Michael R. Baye	Director, FTC Bureau of Economics
Joan Z. Bernstein	Of Counsel, Bryan Cave Former Director, FTC Bureau of Consumer Protection
Darren A. Bowie	Legal Director, North American Markets, Nokia Former Attorney Advisor to FTC Chairman Timothy Muris Former Assistant Director, Division of Financial Practices and Division of Advertising Practices, FTC Bureau of Consumer Protection
Jonathan D. Breul	Partner, IBM Global Business Services Executive Director, IBM Center for the Business of Government
Jeanne Bumpus	Director, FTC Office of Congressional Relations
John E. Calfee	Resident Scholar, American Enterprise Institute Former Special Assistant to the Director, FTC Bureau of Economics
Stephen Calkins	Professor, Wayne State University Former FTC General Counsel
Robert W. Crandall	Senior Fellow, Brookings Institution
Susan A. Creighton	Partner, Wilson Sonsini Goodrich & Rosati Former Director, FTC Bureau of Competition
Anna H. Davis	Executive Director, Government Relations, National Board for Professional Teaching Standards Former Director, FTC Office of Congressional Relations Former Director, FTC Office of Public Affairs
Susan S. DeSanti	Partner, Sonnenschein Nath & Rosenthal Former FTC Deputy General Counsel for Policy Studies Former Director, FTC Office of Policy Planning

Jerry Ellig	Senior Research Fellow, Mercatus Center Former Acting Director and Deputy Director, FTC Office of Policy Planning
Kathryn M. Fenton	Partner, Jones Day Former Attorney Advisor to FTC Chairman James Miller
Rebecca Fisher	Assistant Attorney General, Antitrust Section, Office of the Texas Attorney General
Luke M. Froeb	Professor, Owen Graduate School of Management, Vanderbilt University Former Director, FTC Bureau of Economics
Vivek Ghosal	Professor, School of Economics, Georgia Institute of Technology
Eileen Harrington	Deputy Director, FTC Bureau of Consumer Protection
Thomas W. Hazlett	Professor, George Mason University School of Law
Andrew J. Heimert	Office of Policy & Coordination, FTC Bureau of Competition
Ken Heyer	Economics Director, Economic Analysis Group, U.S. Department of Justice, Antitrust Division
Nancy N. Judy	Director, FTC Office of Public Affairs
Joseph Kattan	Partner, Gibson, Dunn & Crutcher Former Assistant Director, Office of Policy & Evaluation, FTC Bureau of Competition
William E. Kovacic	Chairman, Federal Trade Commission
Thomas G. Krattenmaker	Of Counsel, Wilson Sonsini Goodrich & Rosati Former Advisor, Office of Policy & Coordination, FTC Bureau of Competition Former Assistant Director, FTC Bureau of Consumer Protection
Thomas B. Leary	Of Counsel, Hogan & Hartson Former Commissioner, Federal Trade Commission
Gregory P. Luib	Assistant Director, FTC Office of Policy Planning

William C. MacLeod	Partner, Kelley Drye Former Director, FTC Bureau of Consumer Protection Former Attorney Advisor to FTC Chairman James Miller
Janet L. McDavid	Partner, Hogan & Hartson
Timothy J. Muris	Of Counsel, O'Melveny & Myers Foundation Professor, George Mason University School of Law Former Chairman, Federal Trade Commission
Maureen K. Ohlhausen	Director, FTC Office of Policy Planning
Richard Parker	Partner, O'Melveny & Myers Former Director, FTC Bureau of Competition
Paul A. Pautler	Deputy Director, FTC Bureau of Economics
C. Lee Peeler	President and CEO, National Advertising Review Council Executive Vice President, National Advertising Self-Regulation, Council of Better Business Bureaus Former Deputy Director, FTC Bureau of Consumer Protection
Paul H. Rubin	Professor of Law and Economics, Emory School of Law Professor of Economics, Emory University Former FTC Director of Advertising Economics
Michael A. Salinger	Professor, Finance and Economics Department, Boston University Former Director, FTC Bureau of Economics
Ari Schwartz	Vice President & Chief Operating Officer, Center for Democracy and Technology
David P. Wales	Acting Director, FTC Bureau of Competition
Gregory J. Werden	Senior Economic Counsel, U.S. Department of Justice, Antitrust Division

## **London Roundtable (September 12, 2008)**

Alden Abbott	Associate Director, FTC Bureau of Competition
David Aitman	Co-Head, Global Antitrust, Competition, and Trade Practice Group, Freshfields Bruckhaus Deringer
William Bishop	Vice President, Charles River Associates International Professor of the Economics of Competition, College of Europe in Bruges
Margaret Bloom	Visiting Professor, King's College, London Senior Consultant, Freshfields Bruckhaus Deringer
Maria Coppola Tineo	Counsel for International Antitrust, FTC Office of International Affairs
John Davies	Chief Economist and Former Director of Economic Analysis, United Kingdom Competition Commission
John Fingleton	Chief Executive, United Kingdom Office of Fair Trading
Peter Freeman	Chairman and Former Deputy Chairman, United Kingdom Competition Commission
Edward Humpherson	Assistant Auditor General and Director of Regulation Studies, United Kingdom National Audit Office
Valentine Korah	Emeritus Professor of Competition Law, University College London
Jeremy Lever	Fellow and Senior Dean, All Souls College, Oxford University
Philip Marsden	Director and Senior Research Fellow, Competition Law Forum, British Institute for International and Comparative Law
Maureen Ohlhausen	Director, FTC Office of Policy Planning
Simon Pritchard	Senior Director of Mergers, United Kingdom Office of Fair Trading
Debra Valentine	Global Head of Legal, Rio Tinto plc Former FTC General Counsel

John Vickers	Warden and Drummond Professor of Political Economy and Fellow, All Souls College, Oxford University
Catherine Waddams	Professor, Norwich Business School
Richard Whish	Professor of Law, Kings College, London Non-Executive Director and Former Member of the Director General of Fair Trading's Advisory Panel, United Kingdom Office of Fair Trading
Stephen Wilks	Professor of Politics and Former Deputy Vice Chancellor (Research), University of Exeter

**Ottawa Roundtable (September 18, 2008)**

Anthony Balanza	Senior Partner, Fasken Martineau Dumoulin LLP
John Bodrug	Partner, Davies Ward Phillips & Vineberg LLP
Paul Crampton	Partner, Osler, Hoskin & Harcourt LLP
Russell Damtoft	Associate Director, FTC Office of International Affairs
Calvin Goldman	Chair of the Competition Group, Blake, Cassels & Graydon LLP
Tim Kennish	Counsel and former Co-Chair, Osler, Hoskin & Harcourt LLP
William Kovacic	Chairman, Federal Trade Commission
Margaret Sanderson	Vice President, Charles River Associates International
A. Neil Campbell	McMillan LLP (consultation held Sept. 17, 2008)

### **Chicago Roundtable (September 25, 2008)**

Alden F. Abbott	Associate Director, FTC Bureau of Competition
C. Steven Baker	Director, FTC Midwest Region
Michael R. Baye	Director, FTC Bureau of Economics
William L. Brauch	Special Assistant Attorney General and Director, Consumer Protection Division, Office of the Iowa Attorney General
Henry N. Butler	Executive Director, Searle Center on Law, Regulation, and Economic Growth at Northwestern University Senior Lecturer, Northwestern University School of Law
Thomas Campbell	Partner, Baker & McKenzie LLP
Denis W. Carlton	Senior Managing Director, Compass Lexecon Professor of Economics, University of Chicago Graduate School of Business
Blake L. Harrop	Senior Assistant Attorney General, Antitrust Bureau, Office of the Illinois Attorney General
Paul H. Luehr	Managing Director and Deputy General Counsel, Stroz Friedberg, LLC Former Assistant Director, Division of Marketing Practices, FTC Bureau of Consumer Protection
Fred M. McChesney	Professor of Law, Northwestern University School of Law Former Associate Director, Office of Policy & Evaluation, FTC Bureau of Competition
Aviv Nevo	Professor, Department of Economics and Kellogg School of Business, Northwestern University
Randal C. Picker	Professor of Commercial Law, University of Chicago Law School
Teresa M. Schwartz	Professor Emeritus of Public Interest Law, George Washington University School of Law Former Deputy Director, FTC Bureau of Consumer Protection Former Attorney Advisor to FTC Commissioner Mary Gardiner Jones

Carl Shapiro	Professor of Business Strategy, Haas School of Business, University of California at Berkeley Director, Institute of Business and Economic Research, University of California at Berkeley
Abraham L. Wickelgren	Assistant Professor of Law, Northwestern University Law School Visiting Professor, Duke University School of Law Former Economist, FTC Bureau of Economics
Joshua D. Wright	Assistant Professor of Law, George Mason University School of Law Visiting Professor, University of Texas School of Law Former Scholar in Residence, FTC Bureau of Competition

### **Tokyo Roundtable (October 7, 2008)**

Alden F. Abbott	Associate Director, FTC Bureau of Competition
Yasuhisa Abe	Director, Economic Policy Bureau II, Nippon Keidanren
Toru Aizeki	Deputy Secretary General of International Affairs, Japan Fair Trade Commission
Kei Amemiya	Partner, Morrison & Foerster LLP
Robert Grondine	Partner, White & Case
William Kovacic	Chairman, Federal Trade Commission
Mitsuo Matsushita	Advisor, Nagashima, Ohno & Tsunematsu Professor Emeritus, Tokyo University
Masahiro Murakami	Professor, Graduate School of International Corporate Strategy, Hitotsubashi University
Hideo Nakajima	Deputy Secretary General, Trade Practices Department, Japan Fair Trade Commission
Deirdre Shanahan	Competition Counsel for Asia Pacific, FTC Office of International Affairs
Shozo Takahashi	Director, General Affairs Division, Secretariat, Japan Fair Trade Commission
Kazuhiko Takeshima	Chair, Japan Fair Trade Commission
Jiro Tamura	Professor, Keio University
Akinori Uesugi	Senior Consultant, Freshfields Bruckhaus Deringer Professor, Graduate School of International Corporate Strategy, Hitotsubashi University
Kimitoshi Yabuki	Head, Yabuki Law Offices

**Boston Roundtable (October 14, 2008)**

Alden F. Abbott	Associate Director, FTC Bureau of Competition
Einer R. Elhauge	Caroll and Milton Petrie Professor of Law, Harvard Law School
Hillary Greene	Associate Professor of Law, University of Connecticut School of Law Former FTC Project Director for Intellectual Property
Andrew J. Heimert	Office of Policy & Coordination, FTC Bureau of Competition
Keith N. Hylton	Paul J. Liacos Scholar in Law and Professor of Law, Boston University School of Law
Robert M. Langer	Partner, Wiggin and Dana
Nancy L. Rose	Professor of Economics, Massachusetts Institute of Technology Director, National Bureau of Economic Research Program in Industrial Organization
Michael A. Salinger	Professor and Everett W. Lord Distinguished Faculty Scholar, Finance and Economics Department, Boston University Former Director, FTC Bureau of Economics
Dennis Yao	Lawrence E. Fouraker Professor of Business Administration, Harvard Business School Former Commissioner, Federal Trade Commission

**Brussels Roundtable (October 21, 2008)**

Alden Abbott	Associate Director, FTC Bureau of Competition
Antonio Bavasso	Partner, Allen & Overy Professor of EC Competition Law and Founder and Director of the Jevons Institute, UCL
Hendrik Bourgeois	Senior Counsel, Competition, Regulation and Government Relations for Europe, General Electric Company
Rachel Brandenburger	Partner, Freshfields Bruckhaus Deringer
James Cooper	Acting Director, FTC Office of Policy Planning
Götz Drauz	Partner, Howrey
Luc Gyselen	Partner, Arnold & Porter
Jonas Koponen	Partner, Linklaters
William Kovacic	Chairman, Federal Trade Commission
Jorge Padilla	Managing Director, LECG Research Fellow, Center for Economic Policy Research
John Temple Lang	Consultant, Cleary Gottlieb Senior Visiting Research Fellow, University of Oxford Visiting Professor, Trinity College, Dublin
James Venit	Partner, Skadden, Arps

### **Paris Roundtable (October 24, 2008)**

Alden Abbott	Associate Director, FTC Bureau of Competition
James Cooper	Acting Director, FTC Office of Policy Planning
Sean Ennis	Senior Economist, Organization for Economic Cooperation and Development
Allan Fels	Dean of the Australia and New Zealand School of Government
Alberto Heimler	Central Director for Research and International Affairs, Italian Competition Authority
Nicholas Hill	Chief Executive, New Zealand Commerce Commission
Rene Jansen	Member of the Board, Netherlands Competition Authority (NMa)
Frederic Jenny	Member of the Cours de Cassation, France Chairman, Competition Committee, Organization for Economic Cooperation and Development
William Kovacic	Chairman, Federal Trade Commission
Csaba Kovacs	Head of Section, Hungarian Competition Authority (GVH)
Markus Lange	Head of the International Section of the Bundeskartellamt, Germany
François Lévêque	Professor of Law and Economics, Ecole des Mines de Paris
Francisco Marcos Fernandez	Professor of Law, IE Law School Director General of the Defence Competition Service, Madrid Regional Competition Court
Andreas Mundt	Head of Section, General Competition Law Issues, Bundeskartellamt, Germany
Zoltán Nagy	President, Hungarian Competition Authority (GVH)
Bernard (Joe) Phillips	Head of the Competition Division, Organization for Economic Cooperation and Development

Simon Roberts	Divisional Manager of Policy and Research, South African Competition Commission
Jacques Steenbergen	Director General, Belgian Competition Authority
Walter Stoffel	Chairman, Swiss Competition Commission Professor of Economic Law, University of Fribourg
Monica Widegren	Head of International Section, Swedish Competition Authority

**New York Roundtable (October 24, 2008)**

Joseph Angland	Partner, White & Case
Michael D. Blechman	Partner, Kaye Scholer LLP
Molly S. Boast	Partner, Debevoise & Plimpton LLP Former Director, FTC Bureau of Competition
Beau Brendler	Director, Consumer Reports WebWatch, Consumers Union
Daniel Brenner	Senior Vice President, Law and Regulatory Policy, National Cable & Telecommunications Association
Jerry Cerasale	Senior Vice President, Government Affairs, Direct Marketing Association Former Attorney Advisor to FTC Chairman Janet Steiger
Kevin G. DeMarrais	Senior Business Writer/Columnist, <i>The Record</i> (Bergen County, NJ)
Joy Feigenbaum	Chief, Bureau of Consumer Frauds and Protection, Office of the New York Attorney General
Harry First	Professor of Law and Director, Trade Regulation Program, New York University School of Law
Eleanor M. Fox	Professor of Trade Regulation, New York University School of Law Of Counsel, Simpson Thacher & Bartlett
Leonard L. Gordon	Director, FTC Northeast Region
Jeffrey A. Greenbaum	Partner, Frankfurt Kurnit Klein & Selz, PC
Lois C. Greisman	Associate Director, FTC Bureau of Consumer Protection
Michael Kaiser	Executive Director, National Cyber Security Alliance
Georges G. Korsun	Director, Economic and Statistical Consulting, Deloitte Financial Advisory Services, LLP
Cynthia L. Lagdameo	Counsel for International Antitrust, FTC Office of International Affairs

Andrea C. Levine	Director, National Advertising Division Senior Vice President, Council of Better Business Bureaus
Maureen K. Ohlhausen	Director, FTC Office of Policy Planning
Andreas P. Reindl	Adjunct Professor of Law and Executive Director, Fordham Competition Law Institute, Fordham University School of Law
David T. Scheffman	Director, LECG Adjunct Professor, Owen Graduate School of Management, Vanderbilt University Former Director, FTC Bureau of Economics
Peter P. Swire	Professor of Law, Ohio State University Moritz College of Law Senior Fellow, Center for American Progress

**APPENDIX 2 – LIST OF AGENCIES, ORGANIZATIONS, AND INDIVIDUALS  
PARTICIPATING IN FTC AT 100 EXTERNAL CONSULTATIONS**

Israeli Antitrust Authority, August 19, 2008

Korean Fair Trade Commission, September 4, 2008

Latin American Competition Agencies and International Organizations,  
September 11, 2008:

Superintendent of Companies, Bolivia  
Administrative Council for Economic Defense (CADE), Brazil  
Secretariat of Economic Law, Brazil  
National Economic Prosecutor's Office, Chile  
Superintendent of Commerce, Colombia  
Commission to Promote Competition, Costa Rica  
Ministry of Economy, Ecuador  
Superintendent of Competition, El Salvador  
Commission for the Defense and Promotion of Competition, Honduras  
Federal Competition Commission, Mexico  
Authority for Consumer Protection and Competition Defense, Panama  
Competition Authority, Portugal  
Inter-American Development Bank  
Organization for Economic Cooperation and Development  
United Nations Conference on Trade and Development

United Kingdom Office of Fair Trading, September 11, 2008

United Kingdom Competition Commission, September 12, 2008

United Kingdom Department for Business, Enterprise & Regulatory Reform,  
September 12, 2008

United Kingdom Consumer Organization Representatives, September 12, 2008:

Citizen's Advice  
Consumer Focus (formerly National Consumer Council)  
Privacy International  
Trading Standards Institute/European Citizen's Centre

Japanese Ministry of Economy, Trade, and Industry, September 17, 2008

Canadian Competition Bureau, September 17, 2008

Royal Canadian Mounted Police, September 17, 2008

Ontario Ministry of Small Business and Consumer Services, September 17, 2008

Japan Fair Trade Commission, September 19, 2008

Japanese Cabinet Office, September 19, 2008

South African Competition Tribunal, September 19, 2008

Australian Competition and Consumer Commission, October 2 & 6, 2008

Melbourne, Consultation with Private Sector Stakeholders, October 2, 2008:

Andrew Christopher	Partner, Baker & McKenzie
Linda Evans	Partner, Clayton Utz
Aymon Guigus	Partner, Blake Dawson
Dave Poddar	Partner, Mallesons Stephen Jaques
William Reid	Partner, Blake Dawson
Simon Uthmeyer	Partner, DLA Phillips Fox

Latin American Consumer Protection Agencies and International Organizations, October 8, 2008:

Subsecretariat for Consumer Protection, Argentina  
National Consumer Service, Chile  
Superintendence for Consumer Protection, Colombia  
Directorate for Consumer Protection, Costa Rica  
Office for the Defense of the Consumer, El Salvador  
Directorate for Consumer Protection, Guatemala  
Attorney General for Consumer Protection, Mexico  
Directorate for Consumer Protection, Nicaragua  
National Institute for Defense of Competition and Property Protection, Peru  
National Institute for Consumption, Spain

Buenos Aires, Consultation with Private Sector Stakeholders, October 14, 2008:

Marcelo Calliari	Partner, TozziniFreire Advogados, Brazil
Miguel del Pino	Partner, Marval, O'Farrell & Mairal, Argentina
Marcelo den Toom	Partner, M. & M. Bomchil Abogados, Argentina
Mauro Grinberg	Partner, Barcellos Tucunduva Advogados, Brazil
Ubiratan Mattos	Partner, Mattos Muriel Kestener Advogados, Brazil
Julian Peña	Partner, Allende & Brea, Argentina

Directorate General for Health and Consumer Affairs, European Commission, October 20, 2008

Article 29 Data Protection Working Party (independent advisory group to European Commission), October 20, 2008

Directorate General for Competition, European Commission, October 21 & 23, 2008

Representatives from several member and observer consumer agencies and governmental ministries to the OECD Committee on Consumer Policy, October 22, 2008

Conseil de la Concurrence, France, October 23, 2008

Washington, DC Consultation on International Issues, November 6, 2008:

Donald Baker	Baker & Miller
Terry Calvani	Of Counsel, Freshfields Bruckhaus Deringer
	Former Acting Chairman and Commissioner, FTC
Andrew Gavil	Professor of Law, Howard University School of Law (consultation held Nov. 20, 2008)
R. Shyam Khemani	Principal, Microeconomic Consulting & Research Associates, Inc.
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William Kolasky	Partner, Wilmer Cutler Pickering Hale and Dorr LLP
Abbott (Tad) Lipsky	Partner, Latham & Watkins, LLP (consultation held Nov. 20, 2008)
Deborah Platt Majoras	General Counsel, Procter & Gamble Former Chairman, Federal Trade Commission
Janet McDavid	Partner, Hogan & Hartson LLP
James Rill	Senior Partner, Howrey LLP
Mark Whitener	Senior Counsel, General Electric Company

Irish Competition Authority, November 27, 2008

Australian Communications & Media Authority (via written correspondence)



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