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100 is the New 30: Recommendations for the FTC's Next 100 Years

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I. Introduction

Good morning. Thank you to GCR and the chairpersons of the Antitrust Law Leaders' Forum for inviting me to speak, and to Ilene Gotts for such a warm introduction. I am delighted to be here.

As you all likely know, this year marks the Federal Trade Commission's (FTC) 100th anniversary, and I have entitled this keynote "100 is the New 30: Recommendations for the FTC's Next 100 Years." Institutions and people age at different rates, however, so for human years, I would like to claim that fifty (or fifty-one in my case) is also the new thirty.

All kidding aside, I do believe that despite hitting the century mark, the FTC is still dynamic and effective in pursuit of its core mission to promote competition and protect consumers. That does not mean there is no room for improvement, whether for the agency or for me personally. What I will address this morning is a framework for evaluating the agency's performance and my recommendations for improving the FTC's competition policy work in the future.

[1] The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

II. The FTC at 100 Report

One of the most satisfying opportunities in my career was when Bill Kovacic was FTC Chairman and I was the Director of the Office of Policy Planning, and he asked me to oversee an agency self-assessment in anticipation of the Commission's centennial in 2014. The report of that self-assessment—The Federal Trade Commission at 100: Into Our 2nd Century[2] (FTC at 100 Report or Report)—represented an effort to create a framework for assessing the Commission's performance and to identify where and how the agency may improve as it moves into its second century.

At my official swearing-in as an FTC Commissioner in April 2012, I invoked the FTC at 100 Report as a guide for my work as a Commissioner.[3] In fact, as I will discuss in this keynote, many of the views I have expressed and positions I have taken since becoming a Commissioner reflect my efforts to put into action the underlying principles and philosophy of the FTC at 100 Report. I highly recommend that you take a look at the Report, which is available on the FTC's website.

The Report asked two fundamental questions. First, how well is the agency fulfilling the role that Congress foresaw when it created the agency in 1914? Second, what type of institution should the FTC aspire to be when it starts its second century in 2014?

To answer these questions, I and several of my FTC colleagues undertook a seven-month review that solicited the views of practitioners and scholars, as well as current and former government officials, in the U.S. and around the world. The result was the FTC at 100 Report, a

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[2] WILLIAM E. KOVACIC, CHAIRMAN, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY, THE CONTINUING PURSUIT OF BETTER PRACTICES (Jan. 2009) [hereinafter FTC AT 100 REPORT], *available at* http://www.ftc.gov/reports/federal-trade-commission-100-our-second-century.

[3] *See* Maureen K. Ohlhausen, *Remarks of Maureen K. Ohlhausen on the Occasion of Her Swearing-in as Commissioner, Federal Trade Commission*, at 2-3 (Apr. 16, 2012), *available at* http://www.ftc.gov/speeches/ohlhausen/120416ohlhausenswearingin.pdf.

comprehensive 200-page document that combined these views with scholarly research on agency functioning to craft a set of recommendations for our agency. Among other things, these recommendations addressed what resources the FTC will need in the future, how the agency can better select its priorities for exercising its powers, how to strengthen the Commission's processes for implementing its programs, and how to improve its relationships with other government bodies and nongovernmental organizations. Although all of these recommendations are important, I would like to highlight a few that I believe are particularly compelling and that have thus far had the greatest relevance to me in my tenure as a Commissioner.

First, the FTC at 100 Report explained that a fundamental requirement for the agency is that it clearly articulate its mission. In its most basic terms, the FTC's mission is 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 goals without unduly burdening legitimate business activity.[4] As the Report observes, "[T]he improvement of consumer welfare is the proper objective of the agency's competition and consumer protection work . . . not the status of specific firms or collections of enterprises . . . ."[5] This obligation goes beyond creating a mission statement and requires the agency to articulate clearly not just what it is doing when it takes enforcement action or issues guidance but also to explain why these activities will further the agency's mission.

Another key recommendation in the Report is that the Commission use all of its tools to further its mission and to evaluate carefully what tool or set of tools is appropriate for any given perceived problem. The Report puts it succinctly, saying: "The Commission best fulfills its

[4] *See* FED. TRADE COMM'N, DRAFT FTC STRATEGIC PLAN, FY2014 – FY2018 4 (July 16, 2013), *available at* http://www.ftc.gov/reports/draft-federal-trade-commission-strategic-plan-fiscal-year-2014-through-fiscal-year-2018.

[5] FTC AT 100 REPORT, *supra* note 2, at iii.

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."[6]

The FTC at 100 Report further argues that the Commission must pay close attention to outcomes, rather than simply tallying outputs, examine whether agency activity is actually improving consumer welfare, and determine whether it can be done more effectively. In particular, the FTC should focus 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)."[7]

Further, the Report counsels the Commission to continue to build and maintain support for the FTC's mission throughout the administration, Congress, the states, industry, and the public at large. The agency can accomplish this through outreach to other institutions and groups and by providing careful explanations of what the agency is doing and why. This outreach should also encompass engagement with international organizations and individual countries both to enhance coordination in law enforcement efforts and to promote sound competition and consumer protection policy around the world.

Finally, one of the themes that recurs throughout the FTC at 100 Report is the importance of transparency and predictability.[8] From the core requirement of clearly articulating its mission to measuring why it is fulfilling that mission to the task of building support for that mission, the Report emphasizes the vital need for the Commission to clearly state what it is doing and why. Having a clear mission helps guide FTC staff's activities, and by providing guidance to market

[6] *Id.*

[7] *Id.*

[8] *See, e.g.*, *id.* at 119-21, 128-30, 170-73.

participants on how to comply with the antitrust laws, we build support for our mission by offering predictability, which can also foster increased compliance with the law. Thus, to maintain the support of consumers, the business community, Congress, and other stakeholders, the FTC must be transparent and predictable in its enforcement activities. Although they may not always agree with the agency's action in every matter, these groups need to understand why we take certain enforcement actions and why we decide not to take such action or to use one of our many non-enforcement tools instead. Stakeholder support is critical to our ability to function effectively. In short, increased transparency and predictability improves the effectiveness and credibility of the FTC.

III. Recommendations for the Next 100 Years

As the FTC turns one hundred years old this year, we should use this opportunity not just to celebrate this milestone but to evaluate our strengths and weaknesses so that we can build on our successes and learn from our mistakes. From our administrative litigation to our internal resource allocation to our very jurisdiction under the FTC Act, we should evaluate everything we do, including how we measure success. Drawing upon the insights of the FTC at 100 Report, I would like to respectfully suggest some areas of continued focus, as well as some potential changes, for our agency as we enter our second century.

A. Use All of Our Many Available Tools

As many of you likely have heard me say during my time as a Commissioner, I am a strong advocate for the FTC using all of the tools it has available. In particular, the FTC should always consider the many non-enforcement tools it can use to help stop consumer harm before it arises, thus sparing consumers and businesses unnecessary losses and saving the taxpayer money that we would otherwise spend on litigation. Our non-enforcement tools include policy research and development, competition advocacy, and consumer and business education. Also, letting

self-regulation work, or encouraging industry best practices, may be the best tool to deploy in certain circumstances. Sometimes the FTC may not be the right actor to address an issue, and the market or another part of government is better suited to address the problem. In short, our yardstick for success must be whether we make consumers better off, not simply whether we file a large number of enforcement actions.

The FTC has a significant policy role to play in the competition space using its non-enforcement tools. Let me briefly highlight two that we can and do use in furtherance of our policy mission. The first tool is our authority under Section 6(b) of the FTC Act,[9] which allows us to obtain information under compulsory process from market participants and pursue a study of a particular competition (or consumer protection) issue. As we announced in September of last year, the FTC plans to perform such a study of the impact of patent assertion entity, or PAE, activity on competition and innovation.[10] This study should provide us with a better understanding of the activity of PAEs and its various costs and benefits. The agency plans to address questions regarding PAEs that others have been unable to answer thus far, including: (1) How do PAEs organize their corporate legal structure, including parent and subsidiary entities? (2) What types of patents do PAEs hold, and how do they organize their holdings? (3) How do PAEs acquire patents, and how do they compensate prior patent owners? (4) How do PAEs engage in assertion activity, such as demand, litigation, and licensing behavior? (5) What does assertion activity cost PAEs? and (6) What do PAEs earn through assertion activity?

This study will likely be the most comprehensive and in-depth analysis of these issues, with more than twenty-five PAEs operating across a variety of industries likely to receive

[9] 15 U.S.C. § 46(b).

[10] *See* Press Release, Fed. Trade Comm'n, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 27, 2013), *available at* http://www.ftc.gov/opa/2013/09/paestudy.shtm.

information requests. We also are planning a benchmarking exercise in which we will be sending out information requests to another fifteen entities that assert patents. This latter group will be concentrated in the wireless telecommunication sector and include manufacturers, patent pools, and other entities in this space that license and assert patent rights. We are currently reviewing the sixty-eight public comments we received in response to our initial Federal Register Notice (FRN) to see how, if at all, we should modify the proposed study before issuing our final FRN.

A second non-litigation tool of great importance to the FTC's policy role is competition advocacy. This is an area of particular interest to me because, from 2004 to 2008, I was Director of the FTC's Office of Policy Planning, which oversees the agency's competition and consumer advocacy efforts. Now, as a Commissioner, I continue to support the FTC's efforts in advocating for procompetitive policies.

A recurring theme addressed by our advocacy letters is an attempt by a state legislature or regulatory agency to limit competition from newer or less established competitors that are able to supply comparable (or even superior) services, often at lower cost. A common example in the health care area, which is a significant focus of our advocacy efforts, involves regulations addressing advanced practice registered nurses, or APRNs, which are nurses with specialized training in particular areas. There has been an interest in many states in allowing basic medical services to be provided, not just by physicians, but by APRNs as well. Expanded licensing of APRNs could increase affordable access to quality care in rural and poorer areas of the country—that is, where there are fewer physicians—and may encourage greater price competition among health care providers. I have personally heard from groups representing underserved rural and minority populations about the critical need for these services. We have been actively advocating to state legislatures in letters and testimony to loosen the restrictions on

APRNs to allow them to provide certain treatments and to prescribe certain medications, subject, of course, to responsible measures to control for quality and safety.[11] In short, our advocacies have suggested that any limits on APRNs' ability to provide medical services should be no stricter than necessary to protect patient safety.

As the FTC moves into its second century, I will continue to push for the agency to pursue its important competition policy role through the use of the many tools in its toolbox, including, notably, its 6(b) authority and its competition advocacy efforts.

B. Stay Focused on Our Core Competency

My second recommendation is for the FTC to stay focused on our core competency, which is the development of the antitrust laws and competition policy more generally. To the extent that the agency decides to pursue an expansive standalone Section 5 agenda, however, we ought to clarify the scope of our Section 5 unfair methods of competition (UMC) authority before pursuing such an agenda.

1. Focus on Developing the Antitrust Laws

Despite recurring interest in the FTC's UMC authority under Section 5, in my view, our real success as an agency has come from using our administrative litigation function and our competition policy tools to develop the antitrust laws, particularly in the cases of novel or factually complex conduct. More specifically, conducting competition policy R&D (by, for example, holding workshops and issuing reports) to assess the economic impact of a particular

[11] *See, e.g.*, Letter from Fed. Trade Comm'n Staff to the Hon. Kay Khan, Mass. H.R., Concerning the Likely Competitive Impact of H.B. 2009 (Jan. 17, 2014), *available at* http://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/01/ftc-staff-comment-massachusetts-house-representatives; Letter from Fed. Trade Comm'n Staff to the Hon. Theresa W. Conroy, Conn. H.R., Concerning the Likely Competitive Impact of Conn. H.B. 6391 on Advanced Practice Registered Nurses (Mar. 19, 2013), *available at* http://www.ftc.gov/os/2013/03/130319aprnconroy.pdf; Testimony of Fed. Trade Comm'n Staff before Subcommittee A of the Joint Comm. on Health of the State of W. Va. Legis. on the Review of W. Va. Laws Governing the Scope of Practice for Advanced Practice Registered Nurses and Consideration of Possible Revisions to Remove Practice Restrictions (Sept. 10, 2012), *available at* http://www.ftc.gov/os/2012/09/120907wvatestimony.pdf.

business practice and then, if warranted, using an administrative trial and potentially a Commission opinion to pursue such practice as a violation of the antitrust laws is an extremely valuable means for developing those laws.

Accordingly, the Commission should focus primarily on improving the implementation of the antitrust laws, as we did in the matters that led to the Supreme Court decision in *Phoebe Putney*[12] and the Fourth Circuit decision in *North Carolina Dental*,[13] each of which clarified the proper scope of the state action doctrine. Other valuable contributions to the development of the antitrust laws include the Commission's *Unocal*[14] opinion in the *Noerr-Pennington* area, the Commission's *Three Tenors*[15] and *Realcomp*[16] opinions in the joint conduct area, and the Commission's *Rambus*[17]opinion in the monopolization area.

In sum, the FTC has contributed significantly to developing the antitrust laws through its unique characteristics of policy and research tools as well as its administrative litigation capability. Going forward the Commission should measure its success by looking at how it may continue to make valuable contributions to the antitrust laws.

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[12] *See* FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013).

[13] *See* N.C. State Bd. of Dental Exam'rs v. FTC, 717 F .3d 359 (4th Cir. 2013), *dismissing appeal from In re* N.C. State Bd. of Dental Exam'rs, --- F.T.C. --- (2011) (Comm'n opinion), *available at* http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf.

[14] *In re* Union Oil Co. of Cal., 138 F.T.C. 1 (2003) (*Unocal*) (Comm'n opinion).

[15] *In re* PolyGram Holding, Inc., 136 F.T.C. 310 (2003) (Comm'n opinion), *appeal dismissed*, PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

[16] *In re* Realcomp II, Ltd., --- F.T.C. --- (2009) (Comm'n opinion), *available at* http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf, *appeal dismissed*, Realcomp II, Ltd. v. FTC, 635 F.3d 815 (6th Cir. 2011).

[17] *In re* Rambus, Inc., --- F.T.C. --- (2006) (Comm'n opinion), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf, *rev'd*, Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

2. Clarify the Scope of the FTC's UMC Authority before Invoking It

There has been an ongoing discussion about the scope of the agency's authority under Section 5 of the FTC Act to prevent unfair methods of competition. Although I believe the FTC should devote its efforts to improving the antitrust laws, should the agency wish to bring cases based on its UMC authority, I believe the principles of transparency and predictability demand that the Commission first provide guidance on the scope of this authority through a policy statement. Accordingly, I presented my views on the proper scope of Section 5 last summer in a speech before the U.S. Chamber of Commerce.[18]

Generally speaking, as I stated in my dissent in the November 2012 *Bosch* matter, I believe that we should proceed under a philosophy of "regulatory humility."[19] More specifically, in my Section 5 speech, I offered for thought and discussion six factors that should guide the FTC whenever it reviews conduct beyond the reach of the antitrust laws.[20]

Factor 1: Substantial Harm to Competition. First, the FTC's UMC authority should be used solely to address substantial harm to competition or the competitive process, and thus to consumers. We should refrain from attempting to use Section 5 for policing non-competition violations or achieving social goals. Nor should we use Section 5 to protect individual competitors.[21]

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[18] *See* Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *Section 5: Principles of Navigation*, Remarks before the U.S. Chamber of Commerce (July 25, 2013), *available at* http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf. *See also* Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, J. ANTITRUST ENFORCEMENT (2013), *available at* http://www.ftc.gov/public-statements/2013/10/section-5-ftc-act-principles-navigation-0.

[19] *See* Statement of Commissioner Maureen K. Ohlhausen, at 2, *In re* Robert Bosch GmbH, FTC File No. 121-0081 (Nov. 26, 2012) [hereinafter Ohlhausen *Bosch* Dissent], *available at* http://www.ftc.gov/public-statements/2012/11/statement-commissioner-maureen-ohlhausen ("[T]his enforcement policy appears to lack regulatory humility. The policy implies that our judgment on the availability of injunctive relief on FRAND-encumbered SEPs is superior to that of these other institutions.").

[20] *See* Ohlhausen, *supra* note 18, at 7-15.

[21] *See, e.g.*, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 4-5 & n.22, *In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120 (Jan. 3, 2013) [hereinafter Ohlhausen *Google/MMI* Dissent], *available*

Factor 2: Lack of Procompetitive Justification/Disproportionate Harm Test. Second, to impose the least burden on society and avoid reducing businesses' incentives to innovate, the FTC should challenge conduct as an unfair method of competition only where: (1) there is a lack of any procompetitive justification for the conduct; or (2) the conduct at issue results in harm to competition that is disproportionate to its benefits to consumers and to the economic benefits to the defendant, exclusive of the benefits that may accrue from reduced competition.

Factor 3: Avoiding/Minimizing Institutional Conflict. Third, in using our UMC authority, the FTC should avoid or minimize conflict with the Department of Justice and other agencies. We also should always ask whether the FTC is the right agency to address the issue of concern.

Factor 4: Grounding UMC Enforcement in Robust Economic Evidence. Fourth, any effort to expand Section 5 beyond the antitrust laws should rely on robust economic evidence that the challenged conduct is anticompetitive and reduces consumer welfare.

Factor 5: Use of Non-Enforcement Tools as Alternatives to UMC Enforcement. Fifth, prior to using Section 5, the FTC should consider addressing a competitive concern via its many non-enforcement tools, such as conducting research, issuing reports and studies, and engaging in competition advocacy.

Factor 6: Providing Clear Guidance on UMC. Finally, the FTC must provide clear guidance and seek to minimize the potential for uncertainty in the UMC area, giving businesses a reasonable ability to anticipate before the fact that their conduct may be unlawful under Section 5.

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at http://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-0 (objecting to use of Section 5 in case lacking evidence of substantial consumer harm, as opposed to perceived harm to particular competitors).

Let me conclude this recommendation by noting that, as I indicated in my Section 5 speech, I believe a policy statement on our UMC authority is necessary if the FTC defines such authority expansively. If this authority is limited to addressing the occasional invitation to collude or information exchange case, however, I do not necessarily see a need for a Section 5 policy statement.

C. Expand and Promote FTC Authority over Broadband Issues

Despite my concerns about expansive use of our UMC authority, I also believe there may be instances in which expanding our existing statutory authority would be in the public interest. For example, the exemption from our jurisdiction for communications common carriers frustrates effective enforcement with respect to a wide variety of activities—including privacy, data security, and billing practices—in the increasingly important telecommunications industry. With the convergence of telecom, broadband, and other technologies, it is time for Congress to remove this antiquated limitation on our jurisdiction and put these competing technologies on an equal footing. The Commission has testified in favor of repealing this exemption several times in the past,[22] and, as I recently testified before Congress, I support such a repeal.[23]

Further, within the broadband space, where the concept of network neutrality has been pursued for over a decade now and where the D.C. Circuit just struck down the Federal

[22] *See, e.g.*, Prepared Statement of the Federal Trade Commission on Consumer Privacy before the U.S. Senate Committee on Commerce, Science, and Transportation, at 24-26 (July 27, 2010), *available at* http://www.ftc.gov/os/testimony/100727consumerprivacy.pdf; Prepared Statement of the Federal Trade Commission on Prepaid Calling Cards before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Representatives, at 9-11 (Dec. 3, 2009), *available at* http://www.ftc.gov/os/2009/12/P074406prepaidcc.pdf; Prepared Statement of the Federal Trade Commission before the U.S. Senate Committee on the Judiciary on FTC Jurisdiction over Broadband Internet Access Services, at 9-11 (June 14, 2006), *available at* http://www.ftc.gov/public-statements/2006/06/prepared-statement-ftc-jurisdiction-over-broadband-internet-access.

[23] *See* Supplementary Materials of FTC Commissioner Maureen K. Ohlhausen Concerning "The FTC at 100: Where Do We Go from Here?" before the Commerce, Manufacturing, and Trade Subcommittee of the Committee on Energy and Commerce, U.S. House of Representatives, at 4-5 (Dec. 3, 2013), *available at* http://www.ftc.gov/public-statements/2013/12/supplemental-materials-maureen-k-ohlhausen-ftc-100-where-do-we-go-here.

Communications Commission's (FCC) most recent version of that concept,[24] I support my agency's efforts to apply existing antitrust and consumer protection laws and norms to any alleged discrimination, blocking, or other conduct by broadband providers that would violate so-called network neutrality principles.[25] Looking ahead, consumers would be much better off with the FTC enforcing existing laws in a rigorous, fact-based manner than with the FCC either pursuing network neutrality via yet another statutory basis or, even worse, reclassifying broadband as a common carrier service, which would hamper the FTC's efforts in both the competition and consumer protection areas.[26]

As I have discussed in more detail in other fora,[27] the antitrust laws offer the right lens through which to view most network neutrality issues, including vertical integration, price discrimination, and blocking of content by broadband providers.[28] In particular, the rule of reason, not the per se prohibition of the FCC's network neutrality order, should be used to analyze the consumer welfare effects of such broadband provider conduct. It is simply not justifiable to conclude that, as a rule, the largely vertical conduct decried by network neutrality

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[24] *See* Verizon v. FCC, No. 11-1355, slip op. (D.C. Cir. Jan. 14, 2014) (striking down FCC's 2010 Open Internet Order).

[25] *See In re* Preserving the Open Internet, 25 FCC Rcd. 17,905 (2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

[26] If the FCC were to pursue reclassification of broadband as a common carrier service, the repeal of the common carrier exemption to the FTC's jurisdiction would be all the more important.

[27] *See, e.g.*, Maureen K. Ohlhausen, *Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, and Not More Regulation, Could Protect Innovation on the Web*, 14 ENGAGE 81 (2013); Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *The Open Internet: Regulating to Save the Unregulated Internet?*, Remarks before the MaCCI Law and Economics Conference on the Future of the Internet (Oct. 26, 2012) [hereinafter Ohlhausen Mannheim Speech], *available at* http://www.ftc.gov/public-statements/2012/10/open-internet-regulating-save-unregulated-internet-0.

[28] The consumer protection laws, as enforced by the FTC, can serve as an important complement to the antitrust laws, addressing issues such as disclosures by broadband providers regarding their network management practices, performance, and commercial terms of their services. The FTC has extensive experience in fighting unfair or deceptive acts or practices online. *See, e.g.*, FED. TRADE COMM'N STAFF, BROADBAND CONNECTIVITY COMPETITION POLICY 38-41, 129-37, 161-62 (June 2007) [hereinafter FTC NET NEUTRALITY REPORT], *available at* http://www.ftc.gov/reports/broadband-connectivity-competition-policy.

advocates constitutes facially anticompetitive conduct.[29] Rather, we should evaluate allegations of vertical integration, foreclosure, or price discrimination on the Internet the same way we do everywhere else—by balancing the procompetitive benefits against the anticompetitive harms of those restraints. Given its substantial expertise in analyzing competition (and consumer protection) issues in numerous online contexts, as well as our experience in assessing vertical competition issues, I believe the FTC is well positioned to be an alternative to the more invasive and proscriptive approach that network neutrality regulation imposes.

D. Continue to Pursue International Cooperation and Convergence

The next recommendation I would like to make is that the FTC continue to pursue international cooperation and convergence over the next 100 years. Inter-agency cooperation on competition cases is critical given the global nature of many businesses and transactions and the inter-connected nature of the global economy. The FTC works bilaterally with a large and growing number of jurisdictions on case cooperation and assistance.

As one, important example, the FTC has an increasingly important bilateral relationship with China and its three competition agencies, MOFCOM, SAIC, and NDRC.[30] In July 2011, the FTC and the Department of Justice (DOJ) signed a memorandum of understanding (MOU) with the three Chinese agencies, and since then, we have met on multiple occasions to discuss enforcement and policy issues. Even before the signing of the MOU, the FTC, along with the DOJ Antitrust Division, had devoted considerable resources to working with Chinese officials on

[29] Of course, the relatively few instances of blocking and discrimination are a small minority of the many procompetitive vertical integrations and other fruitful interconnection relationships across the Internet. *See, e.g.*, Ohlhausen Mannheim Speech, *supra* note 27, at 10; FTC NET NEUTRALITY REPORT, *supra* note 27, at 68-69.

[30] The three Chinese competition agencies include the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC).

developing the China Anti-Monopoly Law (AML), which went into effect in 2008.[31] In addition to many informal exchanges, the two U.S. agencies submitted numerous written comments on draft implementing rules and guidelines.

More recently, FTC and DOJ officials participated in the second Joint Dialogue with China's three competition agencies. The FTC and DOJ officials also met separately with each agency and with the Supreme People's Court. The FTC also recently cooperated with MOFCOM in the Thermo Fisher/Life Technologies merger investigation.[32] We are seeking to build a strong, cooperative relationship with China and its competition agencies as they continue to develop and implement the AML. At the same time, we need to address with the Chinese agencies important issues with respect to the implementation of the AML, including transparency and procedural fairness in the investigative process, delays in the merger review process, remedies in merger matters, and antitrust issues that involve intellectual property rights.

Another, related goal for the FTC to continue to pursue is greater convergence upon substantive competition norms, procedural standards, and operational techniques. One of the top priorities of the FTC's international program is its work with multilateral fora, including in particular the International Competition Network (ICN), in developing best practices for the world's competition agencies. Through the ICN and other international fora, such as the OECD Competition Committee and the Asia-Pacific Economic Cooperation forum, the FTC has played a leading role in promoting convergence. Our goal is to convince other competition authorities

[31] For a discussion of the five-year anniversary of the AML, see Maureen K. Ohlhausen, *Illuminating the Story of China's Anti-monopoly Law*, ANTITRUST SOURCE, Oct. 2013, *available at* http://www.ftc.gov/public-statements/2013/10/illuminating-story-chinas-anti-monopoly-law.

[32] *See* Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Thermo Fisher Scientific Inc.'s Proposed Acquisition of Life Technologies Corp. (Jan. 31, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-thermo-fisher-scientific-incs-proposed.

to embrace sound competition policies, which are grounded in economic analysis, respectful of intellectual property rights, and fair and transparent to affected persons and businesses.

Our efforts both on a multilateral and bilateral basis are bearing fruit. We are harmonizing the thinking of enforcers around well-established substantive and procedural norms and are working together with dozens of agencies to handle specific cases in tandem. This valuable work improves the predictability, transparency, and economic efficiency of antitrust enforcement, thereby benefitting U.S. businesses and consumers, and it should remain a top priority for the agency over the next 100 years.

E. Promote Agency Transparency and Predictability

My final recommendation for the FTC's next century—and, of course, I reserve the right to add to this list at least through my term as a Commissioner—is for the agency to be as transparent and predictable as possible. As I discussed earlier, transparency and predictability are crucial to maintaining support for the FTC's mission.

There have been a few matters during my current stint on the Commission in which I believe we have fallen short on these two important measures. First, in July 2012, I opposed the Commission's withdrawal of its 2003 policy statement on seeking disgorgement in competition cases.[33] I expressed concern that by "moving from clear guidance on disgorgement to virtually no guidance on this important policy issue" we were leaving those subject to our jurisdiction without sufficient guidance about the circumstances in which the FTC will pursue the remedy of disgorgement in antitrust matters.[34]

[33] *See* Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), *available at* http://www.ftc.gov/public-statements/2012/07/statement-commissioner-maureen-k-ohlhausen.

[34] *Id.* at 2.

I next raised concerns about transparency and predictability in the *Bosch*[35] and *Google/MMI*[36] matters, which involved fair, reasonable, and non-discriminatory (FRAND) licensing commitments made on standard-essential patents (SEPs). In my dissents in those two matters, I took issue with, among other things, the lack of transparency and predictability that these decisions provided patent holders and others subject to our jurisdiction.[37] In addition to concerns about the lack of guidance on our UMC authority, I also argued that when we rely on Section 5, which only the FTC enforces, rather than the antitrust laws, which both the FTC and the Justice Department enforce, we risk creating two different standards for patent holders, depending on which agency happens to review the alleged misconduct. These conflicts, whether real or perceived, create confusion in the market and undermine predictability for market participants who hold or use SEPs.

In contrast to the withdrawal of the disgorgement policy statement and the two SEPs matters, in my view, the FTC has offered significant transparency and predictability in the merger review context. One of the most useful means for providing such transparency and predictability is the issuance of closing statements in significant investigations that the Commission ultimately closes without taking any action. Whether they are issued by the Commission or the Bureau of Competition Director, these statements offer important insights

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[35] *In re* Robert Bosch GmbH, FTC File No. 121-0081 (consent order requiring Bosch, first, to agree not to seek injunctions on its SEPs against parties that are willing to license such patents, and, second, to license those patents on a royalty-free basis).

[36] *In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120 (consent order imposing a multi-step process that Google must go through before it is permitted to seek injunctive relief on its SEPs).

[37] *See* Ohlhausen *Bosch* Dissent, *supra* note 19, at 3 ("Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition . . . ."); Ohlhausen *Google/MMI* Dissent, *supra* note 21, at 5 ("I disagree with my colleagues about whether the alleged conduct violates Section 5 but, more importantly, believe the Commission's actions fail to provide meaningful limiting principles regarding what is a Section 5 violation in the standard-setting context, as evidenced by its shifting positions in *N-Data*, *Bosch*, and this matter.").

into the agency's merger analysis to firms contemplating transactions and the counselors who advise them.

For example, last November, the FTC closed its seven-month investigation into the proposed $1.2 billion merger of office supply superstores Office Depot and OfficeMax. In light of its previous action to block the merger of Staples and Office Depot in 1997, the Commission issued a statement detailing the basis for its decision.[38] The Commission described differences in the competition faced by office supply superstores in 1997 and today. For instance, other retailers such as Wal-Mart and Target, as well as club stores like Costco and Sam's Club, have expanded their office supply product offerings and now compete with office supply superstores. Additionally, Internet retailers of office supplies, most prominently Amazon, have grown quickly and significantly and compete with office supply superstores. As a result, the Commission did not find any potential harm to competition from this transaction. As an aside, I would note that agency predictability does not necessarily mean the agency reaches the same result in the same market over time, particularly when the relevant facts change, as they clearly did in the Office Depot/OfficeMax matter.

IV. Conclusion

To conclude, I acknowledge that there are certainly good things about being thirty, instead of 100 or even fifty-one. But, with age also comes wisdom, and I hope the agency will be guided by the wisdom in Chairman Kovacic's FTC at 100 Report as we enter our second century this year.

Thank you very much for your attention. I would be happy to entertain any questions you may have.

[38] *See* Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., FTC File No. 131-0104 (Nov. 1, 2013), *available at* http://www.ftc.gov/public-statements/2013/11/statement-commission.