

Interview with William E. Kovacic, Chairman, Federal Trade Commission

Editor's Note: In this interview with The Antitrust Source, FTC Chairman William E. Kovacic discusses in great depth and with impressive candor the FTC as an institution and the on-going FTC self-assessment project, laying out his priorities for the FTC and the challenges he sees the FTC facing in the future. Among other topics, in this interview, Chairman Kovacic discusses his views on what the FTC has learned from recent merger challenges, the level of cooperation with the DOJ's Antitrust Division and with state attorneys general, and the FTC's dual role as a competition authority and a consumer protection agency. He also discusses the progress that has been made over the past several years on international convergence and the opportunities that he sees for additional on-going efforts on this front in the future. The interview was conducted on June 30, 2008, by Editorial Chair Patrick Thompson for The Antitrust Source.

This is Bill Kovacic's third time serving the FTC. From 1979 to 1983 he worked with the Bureau of Competition's Planning Office and later as an Attorney Advisor to Commissioner George W. Douglas. He served as the FTC's General Counsel from 2001 to 2004. In January 2006, he was appointed as an FTC Commissioner and in March 2008, he was designated to serve as Chairman. Prior to his appointment as an FTC Commissioner, Kovacic was the E.K. Gubin Professor of Government Contracts Law at George Washington University Law School, from which he has a leave of absence.

Kovacic has written countless articles related to antitrust and consumer protection. He is the co-author, with Stephen Calkins, of the 5th Edition of Ernest Gellhorn's *Antitrust Law and Economics in a Nutshell* (2004), and is a co-author, with Andrew Gavil and Jonathan Baker, of *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy* (2d ed. 2008). In addition to being a noted scholar, Kovacic has advised numerous foreign governments on issues related to antitrust and consumer protection. Since 1992, he has served as an advisor to Armenia, Benin, Egypt, El Salvador, Georgia, Guyana, Indonesia, Kazakhstan, Mongolia, Morocco, Nepal, Panama, Russia, Ukraine, Vietnam, and Zimbabwe. Among his many achievements and antitrust-related activities, he was the public face of much of the televised commentary during the height of the Microsoft case.

—ELIZABETH M. BAILEY



William E. Kovacic

THE ANTITRUST SOURCE: On behalf of the entire Editorial Board we want to thank you for participating in this interview. We last spoke to you in January 2004 when you were the FTC's General Counsel. In March 2008, you were designated the Chairman of the FTC. My first question is: As Chairman, what priorities do you have for the Federal Trade Commission?

BILL KOVACIC: In general terms, three stand out. The first is to continue and enhance the many good competition and consumer protection programs that the Commission is pursuing and, in many instances, has built progressively over the past three decades. The FTC's work has yielded great returns for consumers. By the time my period of stewardship comes to a close, I hope to hand over to my successor an agency that is in still better shape.

The second goal is to engage the agency in a basic self-assessment. The project we are calling *The FTC at 100: Into Our Second Century* will be what a university department facing an

accreditation renewal would call a self-study.¹ The FTC will ask what sort of agency it wants to be when it reaches its centennial in 2014. We will take a longer term perspective than typical Presidential election transition reports, which often are somewhat shallow in substance and short-sighted in their orientation. When I speak of shallowness and short-sightedness, I speak with authority because I have been involved in such exercises in the past.

The traditional transition reports can be helpful to a point, but the real question for the long term for the FTC is how to achieve the continued enhancement of the institution. We need to ask what kind of agenda, what types of programs the Commission should pursue over the next six years or so. By focusing further ahead, we can decouple the inquiry from any single electoral cycle and assess more deeply how the agency can fulfill the destiny that Congress intended when it founded the FTC in 1914.

The third aim is to improve cooperation and partnerships with institutions outside the Commission both at home and abroad. That's a major path to improved performance for any organization, like the FTC, that shares responsibilities with many other public bodies and whose effectiveness depends heavily on contributions from non-government institutions. There are large possibilities for improved policy making through better cooperation with government and non-government bodies. This is so for at least two reasons. First, the FTC has a budget of about \$240 million in the current fiscal year. It is a long way from being a billion-dollar-a-year agency. The FTC and other public institutions with competition or consumer protection duties are unlikely to receive massive increases in resources. If the FTC and related public authorities are to become more productive, they must do better to pool their efforts. Second, there also are strong capabilities relevant to our duties outside the public enforcement authorities—for example, in university research centers, think tanks, and a variety of other not-for-profit institutions. We need to find ways to draw more extensively on these capabilities to improve our work.

So the three main priorities on my list are to sustain and enhance the many strong programs that the Commission has going already, to engage in a probing self-assessment by means of internal reflection and external consultation about the kind of agency the FTC wants to be when it reaches its centennial, and to improve the institutional framework through which the FTC operates by improving cooperation with government and non-government bodies at home and abroad.

ANTITRUST SOURCE: Let's start with the first priority that you noted. Thinking about how you would like to work toward continuing and enhancing the programs at the Commission, what types of specific programs do you have in mind? Is there any difference between your program priorities and those of your predecessors?

BILL KOVACIC: In many ways my priorities are quite similar to those the FTC has embraced over the years since I first came to the agency in 1979. Most of the things I have in mind have antecedents in the Commission's modern experience. I hope to continue and extend them.

Here are some specific examples. On the competition side, one of the best investments the FTC has made has been in the field of health care. This includes pharmaceutical and non-pharmaceutical issues. No FTC competition initiative has been more important than the health care program. The FTC's modern health care initiatives have deep, long-lived roots. The early foundation for the modern program was set with Commission's case against the American Medical

¹ Information on *The FTC at 100* is available at <http://www.ftc.gov/ftc/workshops/ftc100/index.shtml>.

Association in the 1970s concerning restrictions on advertising and pricing and with the agency's case against Pfizer involving monopolization of tetracycline in the 1960s. The FTC's health care work has been enormously important in building a jurisprudence concerning the application of antitrust law to the professions, and it has delivered vast economic benefits to consumers.

In the pharmaceutical sector, the Commission began to focus in the 1990s on the competitive consequences of the entry of generic pharmaceuticals as alternatives to branded pharmaceuticals. The first generation of FTC cases resulted in a number of settlements in the late 1990s. The second generation of FTC cases, including matters such as *Schering*,² was launched early in this decade. This collection of cases yielded a defeat for the FTC in *Schering* and favorable settlements in cases such as *Bristol-Myers Squibb*.³ The FTC today is engaged in what be called a newer generation of pharmaceutical cases that seeks to develop doctrine that governs the relationship between branded producers and generic producers and attempts to provide good economic results for consumers in an extremely significant sector.

When I became the FTC's General Counsel in 2001, the agency undertook a careful assessment of how the Commission could invest its competition resources to have the greatest positive economic effect. One area chosen for attention was the pharmaceutical sector. This area featured imposing doctrinal risks but also offered the possibility of achieving extraordinary economic results. A noteworthy element of this success story is the FTC's settlement with Bristol-Myers Squibb (BMS) in 2003 to resolve allegations that the firm had engaged in illegal monopolization by improperly manipulating the Food and Drug Administration's "Orange Book" process for the registration of pharmaceutical products. The successful prosecution of that case has yielded cumulative benefits to consumers of at least \$3–\$5 billion, and the number is still growing. No single FTC monopolization case going back to the agency's origins has yielded greater, immediately observable results for consumers. If we assembled a list of the Commission's most effective antitrust interventions of all time, *BMS* would be on any list of the top five, and it may be at the top. The decision in 2001 to expand the FTC's commitment of antitrust resources to the pharmaceutical sector flowed from an assessment of the successful work the agency had done in the past, from a sense of what rate of return the FTC might realize for consumers, and from a well-considered understanding of where the Commission could clarify doctrine by prosecuting cases. The modern elaboration of the program demonstrates good practice in the form of identifying a promising area for intervention and undertaking continuing refinements over time in light of experience and changing industry conditions.

Another area where I expect the FTC to continue to make competition policy investments is the field of standard setting. Like the pharmaceutical antitrust issues I described earlier, this subject has been a matter of longstanding concern for the Commission. The FTC's current program is an extension of measures first set in motion with policy studies undertaken in the 1970s and enforcement initiatives, such as *American Society of Sanitary Engineering*⁴ in the 1980s and *Dell Computer*⁵ in the 1990s. In the stocktaking that took place in mid-2001, this was another area where it was apparent that the FTC could make an economically significant and doctrinally influ-

² *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert denied*, 548 U.S. 919 (2006).

³ *Bristol-Myers Squibb Co.*, No. C-4076, 2003 WL 21008622 (FTC Apr. 14, 2003), available at <http://www.ftc.gov/opa/2003/03/bms.shtm>.

⁴ *Am. Soc'y of Sanitary Eng'g*, 106 F.T.C. 324 (1985).

⁵ *Dell Computer Corp.*, 121 F.T.C. 616 (1996).

ential contribution. The *Unocal* case,⁶ which resolved allegations that the respondent had engaged in illegal monopolization by abusing the State of California's process for establishing standards for gasoline, is one noteworthy extension of these efforts. The *Unocal* experience underscores the gains to be achieved in this field. The settlement in that case in 2005 has resulted in savings to consumers of gasoline in California of about \$500 million per year. Despite the adverse litigation outcome we have realized to date in our *Rambus* case,⁷ I expect the FTC to continue to look for good cases involving standards.

Other areas of particularly acute interest for the FTC on the competition side include energy policy. The agency is engaged in a rulemaking process involving the authority Congress established in December 2007 to address market manipulation of petroleum products.⁸ The Commission also continues to look carefully at mergers in the energy sector.

The successful result

the FTC achieved in

the Inova hospital

merger reflects

extensive work we

have undertaken to

refine our internal

analysis and litigation

preparation methods.

I also expect the Commission to continue its efforts to clarify doctrine governing relationships among competitors. In this decade, the FTC has pursued a series of cases that include *PolyGram*⁹ and *North Texas Specialty Physicians*.¹⁰ In both of those cases, the courts of appeals upheld the FTC's finding of liability and endorsed the Commission's efforts to develop a methodology for analyzing matters that fall within the broad framework of the rule of reason. The FTC's efforts to clarify doctrine continue today, and I expect they will receive still greater emphasis. Other key areas of concern for nonmerger enforcement include the scope and application of the state action and *Noerr* defenses.¹¹

In recent years, inspired by setbacks in such cases as *Arch Coal*¹² and *Western Refining*,¹³ the Commission has devoted substantial attention to its approach to analyzing mergers and litigating challenges to individual transactions. The successful result the FTC achieved in the *Inova*¹⁴ hospital merger reflects extensive work we have undertaken to refine our internal analysis and litigation preparation methods. I expect the Commission to continue to develop merger jurisprudence through our administrative process in cases such as *Evanston*¹⁵ and to devote substantial resources to federal court litigation. Thanks to the exceptional work of Bill Blumenthal, our General Counsel, and his appellate litigation team, recent decisions, such as *Chicago Bridge* in the Fifth

⁶ Union Oil Co., No. 9305, 2005 WL 2003365 (FTC Aug. 2, 2005), available at <http://www.ftc.gov/os/adjpro/d9305/index.shtm>; see also Union Oil Co., No. 9305, 2004 WL 1632816 (FTC July 6, 2004) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>.

⁷ Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008). As of July 31, 2008, the FTC's Petition for Rehearing en banc is pending and available online at <http://www.ftc.gov/os/caselist/0110017/080606rambusrehearingpetition.pdf>. Information on the Commission's administrative proceedings in this matter is available online at <http://www.ftc.gov/os/adjpro/d9302/index.shtm>.

⁸ See generally Petroleum Industry Market Manipulation Rulemaking Information, <http://www.ftc.gov/ftc/oilgas/index.html>.

⁹ PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

¹⁰ N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008) (affirming Commission's analytical approach and conclusions but remanding for minor modification of order). Additional information on this case, including the Commission's final opinion and order is available online at <http://www.ftc.gov/os/adjpro/d9312/index.shtm>.

¹¹ See generally FEDERAL TRADE COMMISSION STAFF REPORT CONCERNING ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE (Oct. 2006), available at <http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf>; see also Federal Trade Commission, Report of the State Action Task Force (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

¹² FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

¹³ FTC v. Foster, No. Civ. 07-352, 2007 WL 1793441 (D.N.M. May 29, 2007).

¹⁴ Complete information on the *Inova* case is available on the Commission's Web site at <http://www.ftc.gov/os/adjpro/d9326/index.shtm>.

¹⁵ Evanston Nw. Healthcare Corp., No. 9315, 2007 WL 2286196 (FTC Aug. 6, 2007). Additional documents relating to the administrative proceedings are available online at <http://www.ftc.gov/os/adjpro/d9315/index.shtm>.

Circuit¹⁶ and *Whole Foods* in the D.C. Circuit¹⁷ have provided useful foundations for future FTC merger enforcement.

On the consumer protection side, a similar philosophy of sustaining and enhancing successful FTC programs shapes my preferences. The top of the list of priorities includes privacy, data protection, and financial services. For example, the FTC's financial services program today, including recent subprime market cases such as *CompuCredit*,¹⁸ covers the full life cycle of financial services transactions—from the advertising and the marketing of financial services products through scrutiny of debt collection and debt relief programs. In all areas of the FTC's consumer protection program, serious fraud—such as identity theft—is an especially high priority, which the agency addresses with enforcement matters, research, and education programs directed to consumers and the business community.

A necessary foundation for all competition and consumer protection activities will be an expanded commitment of resources to improve the FTC's base of knowledge. The depth and quality of knowledge we develop through our own research and through external consultations in the form of conferences, hearings, and workshops go a long way to determining the agency's ability to devise effective consumer protection and competition programs, especially to address ever more complex commercial phenomena. Our knowledge is a vital capital asset, and we must treat the enhancement of this asset as an absolute imperative. To a growing extent, the FTC's future success will depend on the level of our capital investments in research and analysis. I expect the level of our investments in policy research and development will expand in the months and years ahead.

ANTITRUST SOURCE: You've identified a lot of very exciting areas and we're going to explore many of them as we talk today. Let's start with merger policy and refining techniques in light of recent litigated outcomes. What kinds of changes have you seen in general, and what is your perspective on the transaction that was proposed between Inova Health System and Prince William Health System?

BILL KOVACIC: The Inova/Prince William Health System transaction is a good example of how the agency has learned and applied very useful lessons through a process of critical self assessment concerning experience with such cases as *Arch Coal* and *Western Refining*. For example, in the Inova transaction, the FTC did a better job of working with our experts and in identifying the questions that most required their attention. The agency was more effective in how it examined evidence collected through the Hart-Scott-Rodino premerger review process and through other information-gathering tools. The members of the Commission took a more aggressive role in evaluating and testing arguments early in the merger review process. The Commission was involved earlier than past practice in assessing the quality of the staff's evidence. More than it had in the past, the agency used an internal "devil's advocate" team to develop and present arguments that the merging parties were likely to raise, to make sure that no argument would be presented during litigation that would come as a surprise. We spared no effort to ensure that we had identified the best arguments and evidence the parties might offer.

¹⁶ Chicago Bridge & Iron Co. N.V. v. FTC, No. 05-60192, 2008 WL 2600965 (5th Cir. July 2, 2008).

¹⁷ FTC v. Whole Foods Market, Inc., No. 07-5276, 2008 WL 2890688 (D.C. Cir. July 29, 2008).

¹⁸ 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>.

All of these preparation techniques improved our development and presentation of the case. Although we don't know, of course, how the district judge would have responded to the agency's arguments, Jeff Schmidt and his litigation team in the Bureau of Competition were particularly well-prepared to present the Agency's case for the preliminary injunction. That preparation was informed substantially by the result of very careful learning from our recent litigation experiences.

As a matter of process in the Inova matter, the FTC also undertook some innovations to assure the district court about how swiftly the Commission would conduct its administrative process if the court issued a preliminary injunction and referred the matter back to the FTC for administrative proceedings. The FTC wanted to make clear that the agency would conduct its administrative proceedings in a highly expeditious manner.

In taking the steps I have just outlined, the FTC had some uniquely capable resources at its disposal, particular in the person of Commissioner Tom Rosch. Commissioner Rosch is a highly experienced and accomplished trial lawyer and appellate advocate. The Commission provided assurances to the court that the agency would move the administrative process in the expeditious manner that Congress seems to have anticipated when it established the 13(b) preliminary injunction mechanism.¹⁹ What specific effect that commitment had on the resolution of the matter is very difficult to say. The Commission thought carefully about objections that have been raised about the 13(b) process and about the agency's administrative process, and we were prepared to address them. I anticipate that in future matters the agency will strive to find ways to improve its administrative process to achieve the interaction that Congress intended between the preliminary injunction process in federal court and the Commission's administrative process.

ANTITRUST SOURCE: You noted that Commissioner Rosch was identified as the Administrative Law Judge in the Inova matter. What was the rationale for appointing him the ALJ in that case and what are the FTC's rules or standards that allow for Commissioner Rosch to serve in the capacity of both a Commissioner and an ALJ?

BILL KOVACIC: The technical possibilities for taking this approach have existed for many decades. The foundation is the Administrative Procedure Act (APA). The APA allows an independent regulatory commission to designate one of its members to serve as the trier of fact. The FTC's administrative regulations reflect the framework contemplated in the APA. The central objective of taking such a step was to ensure that the Commission would expedite its administrative process. To ensure fairness in that process, Commissioner Rosch did not participate in the decision to prosecute. He would not have participated in the appeal of any decision he issued as the administrative law judge to the Commission. With Commissioner Rosch, the FTC had an especially capable, experienced individual to conduct the first stage of the administrative proceeding. The convergence of those factors led us to try this out.

ANTITRUST SOURCE: Let's talk about the FTC self-assessment and the FTC as an institution. In your view, what are some of the current challenges that the FTC faces?

BILL KOVACIC: The question of how to assess the quality of performance of the FTC or any other public institution often receives closer attention during the run-up to a presidential election. The issue arises in our interactions with the legislature and in broader discussions about the Commission's

¹⁹ 15 U.S.C. § 53(b).

work. What often gets lost in these debates is the basic question of how to define what constitutes good performance. When someone asks whether the FTC is a good agency, an adequate agency, a great agency, or an inadequate agency, it is impossible to answer intelligently without first establishing the criteria by which we are to assess the quality of performance. Is the measure of what the FTC does simply the number of cases it brings? Is it the litigation outcome of those cases? Is it the actual demonstrated economic impact of those cases? Is it the skill with which the FTC applies its non-litigation policy instruments—for example, the nature and quality of reports, or the agency's use of public consultation mechanisms such as workshops, seminars, conferences?

How important a measure of the FTC's performance is the skill with which the agency cooperates with other public bodies at home and abroad to reduce the cost of executing the Agency's competition and consumer protection responsibilities? How much should an evaluator weigh the quality of the investment the FTC has made in the international competition and consumer protection policy infrastructure—in institutions such as the International Competition Network (ICN), or in the competition and consumer committees of the Organization for Economic Cooperation and Development (OECD)?

Is another measure the quality of the FTC's investments in building knowledge—capital investments that make the agency wiser? Is it the quality of our human capital and the steps the agency has taken to make this a good place for its employees to work?

So often discussions about whether the FTC is doing a good job fail to come to grips with the basic question of how to write the report card by which we should grade an agency and assess its performance. I want to inspire an internal and external debate about this basic question. In reading the many general and specific assessments about the FTC, I am intrigued by how infrequently commentators address the necessary, initial question of how to identify good performance. So often I find that this fundamental question is ignored. Maureen Ohlhausen, who directs our Office of Policy and Planning, is leading our efforts in the *FTC at 100* project to address it.

A second basic challenge is to find effective techniques for measuring good performance once we have decided what the appropriate criteria are. Suppose we examine decisions to initiate cases or decisions not to prosecute. How best are we to measure the actual impact of those policy choices? Answering that question can force one to face some very difficult methodological challenges, but getting convincing answers to those questions and tackling the hard methodologies issues are indispensable to resolving so many of the policy debates that today take place in a empirical vacuum.

A third major challenge is to figure out how to recruit and retain the human resources that we need to do a good job and to obtain adequate physical resources in the form of facilities and equipment. As a nation, we have made the deplorable decision to pay our skilled administrative staff, economists, and attorneys astonishingly less than competing rates in the private sector. We are going to have to find creative ways to keep good people here and bring talented individuals in. One way we do that is to give our employees work that they find uniquely stimulating and highly fulfilling at the deepest emotional and professional level. We can do things to make the workplace environment more attractive by offering flexible work schedules and good telecommuting options. We have an excellent daycare center in our headquarters building at 600 Pennsylvania Avenue. Beyond these measures, we need to explore more deeply how to amass the requisite human capital in the years ahead. Our Executive Director, Chuck Schneider, is taking the lead on these issues in the *FTC at 100* project. We face increasingly difficult policy challenges that place ever greater demands on our institution. We will succeed only if we recruit and retain a professional and administrative staff that is equal to the challenge.

So often discussions about whether the FTC is doing a good job fail to come to grips with the basic question of how to write the report card by which we should grade an agency and assess its performance.

Another major challenge is to determine how best to go about deciding what we're going to do. What are best techniques for planning the allocation of our resources? To some extent we have very specific statutory mandates that dictate how we're going to use resources. Notwithstanding these statutory commands, we still have substantial discretion to set policy and determine the agency's effectiveness by our distribution of resources. There is no greater responsibility for top FTC management than deciding what the agency's strategy is to be and to have in place a good mechanism for allocating resources wisely to carry out that strategy.

A major reason to conduct a thorough self-assessment is to study how the FTC has generated good programs in the past. The Federal Trade Commission today is far superior to the institution I first encountered when I came to the agency as a junior case handler in 1979. The FTC's ascent to the front ranks of government agencies did not take place by accident. I would like for us to learn from our past success in formulating good programs and to replicate that success.

Another inspiration for launching this initiative comes from my experience in watching our counterpart government agencies abroad. Many of our public agency counterparts on the competition and consumer protection side have engaged in enormously productive exercises to ask what they are all about and to pose the hardest questions about how they can get better. In the course of watching many of those experiments close at hand, I have wanted to find an opportunity to commit the FTC to this kind of process in the hope of realizing the good policy results that rigorous self-assessment has yielded overseas. I would like to see the FTC be no less aggressive in seeking the same benefits from an ongoing process of institutional improvement.

The quality of institutional design, institutional infrastructure, and institutional process has a great deal to do with determining the quality of substantive outcomes. The same energy that's dedicated to asking what's the right doctrine or what's the right conceptual framework has to be applied to questions concerning optimal institutional design and operational arrangements. These institutional considerations are fundamental to achieving good policy outcomes. The urgency for a public agency with the FTC's responsibilities to conduct a rigorous self-assessment as a means toward continuous improvement has never been greater.

ANTITRUST SOURCE: The first two factors that you identified in discussing this self-assessment concern how many cases the FTC brings and the outcomes of those cases. The FTC recently appointed Robby Robertson as its Chief Trial Counsel in the Bureau of Competition. Is this appointment a signal that the FTC plans to increase its litigation activity?

BILL KOVACIC: I'm not sure that the rate at which we initiate new cases will increase dramatically. When you look at the profile of the agency's case generation and, more specifically, its use of administrative litigation, you have to go back to the 1980s to find a comparable number of new matters. If you focus on non-merger litigation in the district courts, the FTC's pattern of competition and consumer protection litigation in this decade is particularly robust if measured by any historical norm going back to the enactment of Section 13(b) in the 1970s.

Robby Robertson inherits an office that Michael Bloom ably established several years ago and managed very well. Robby brings extraordinary skills and experience to this endeavor. He will help us address two important needs. The first is for the agency to become more proficient in how we select and frame cases for litigation. Robby will help us improve our case selection and preparation. Second, Robby will be instrumental in improving the skill with which we litigate the cases we do bring. These improvements in the preparation and prosecution of cases promise to make the FTC more efficient and to open up possibilities for doing more. If we can become more efficient

in preparing and presenting cases, we will have more resources to apply to new matters. So I expect that Robby will help make us better at what we're already doing and to give us the capacity to do more things, as well.

ANTITRUST SOURCE: Focusing on the issue of the infrastructure of the Federal Trade Commission, there are a number of Bureaus within the organization including the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics. Do you think the mandates of any of these Bureaus will or should change in light of the FTC self-assessment?

BILL KOVACIC: I can imagine a continuing process of adjustment with respect to the organization and roles of our main internal units: Competition, Consumer Protection, Economics, Executive Director, General Counsel, International Affairs, Policy Planning, Regional Offices, Public Affairs, Congressional Relations, and Secretary. One of Debbie Majoras's most important steps as Chairman was to pursue significant enhancements of our organizational infrastructure.

On the consumer protection side, Debbie took a single office that previously had dealt with a variety of financial services and information issues and created two more specialized bodies. Under Debbie's leadership and the guidance of Lydia Parnes, who heads the Bureau of Consumer Protection, the FTC formed a Division of Privacy and Identity Protection under Joel Winston's guidance and established a Division of Financial Practices under the supervision of Peggy Twohig. This restructuring has permitted the agency to do a better job of addressing concerns in both areas. Another institutional reconfiguration that has been quite valuable for us was to take international functions that previously had been distributed throughout the agency and to create a single Office of International Affairs, which is now headed by Randy Tritell. This measure has provided greater coherence for our international activities. These and related steps stem from a continuing imperative on our part to improve our organizational framework as one way to strengthen our capacity to devise and deliver substantive programs.

A further example in the Bureau of Economics involves the recognition that one of the FTC's greatest strengths is the ability of our economists to spot important topics and to develop a research agenda to analyze them. With the support of Debbie Majoras, Michael Baye, the Director of our Bureau of Economics, placed Pauline Ippolito and Dan Hoskin in charge of a new research unit to ensure that we would have an office dedicated to overseeing the Bureau's research and development activities. This was another step to see that the FTC's organization matches the agency's policy priorities and program demands. If the FTC is to fully embrace superior practices that have been proven in other jurisdictions and in the Commission's own experience, the agency will need to undertake a continuing reassessment of how to shape its structure to best address operational needs. This reassessment never ends. The pursuit of institutional innovation is a major focus of *The FTC at 100* self-assessment.

ANTITRUST SOURCE: As General Counsel, you spoke about the importance of international convergence as a policy matter. What is the level of cooperation that you currently see and what are some of the opportunities for international convergence that you see in the coming years?

BILL KOVACIC: The need to devote growing resources to processes that facilitate international convergence and cooperation grows all the time. The FTC's efforts in this respect are likely to expand on several fronts. One is the dedication of more resources to the larger multinational networks, such as the OECD (Organization for Economic Cooperation and Development) and the ICN

The need to devote

growing resources

to processes that

facilitate international

convergence and

cooperation grows

all the time.

(International Competition Network). The ICN came into being in the Fall of 2001 and has attracted a massive commitment of efforts from the FTC and the Antitrust Division of the Department of Justice. As it approaches its seventh anniversary, the ICN has been highly successful in providing a focal point for identifying superior practices and in promoting a process of voluntary opting-in to superior practices by individual competition authorities.

The good results achieved in the ICN have been possible only because the U.S. competition agencies and many of their foreign counterparts have committed substantial high quality resources to the endeavor. The FTC has assigned some of its very best people to this process. It is important to realize that the rough classification scheme by which organizations are evaluated ordinarily would depict the ICN and related international cooperation activities as “overhead” rather than “operations.” The FTC professionals who have had much to do with the success of the ICN usually are not directly working on the index of activity that most observers treat as the measure of agency effectiveness: prosecuting cases. Through the work of attorneys, such as Russ Damtoft, Liz Kraus, Cynthia Lewis Lagdameo, Maria Tineo, and Randy Tritell, the FTC has contributed the type of indispensable human talent that makes a cooperative multinational venture such as the ICN effective. The ICN and other multinational competition cooperation and convergence efforts will fall flat unless the FTC and other competition agencies commit especially good people to them.

A major frontier for the future is to continue this commitment and expand where necessary our dedication of resources to these initiatives. The same can be said about bilateral relationships with institutions, such as the European Union’s Directorate for Competition. With the EU and our other major partners abroad, I hope that we will take the type of intensive case-related cooperation we now carry out on merger matters and extend it to non-merger matters. That would be a valuable supplement to what we do now, but it would involve an expanded commitment of resources.

A third extremely important area is technical assistance. In recent years the Congress has put our technical assistance program on a much better footing by providing a specific appropriation for this kind of effort. As a result, the FTC is now carrying out programs in Peru and South Africa in which Commission employees serve as full-time resident advisors. We now have resources to do an expanded program of technical assistance in the form of short-term and long-term missions. These projects succeed only if the FTC sends its very best people. You cannot send rookies or people whom the agency regards in some sense as being dispensable. If you do not send your best professionals, the technical assistance projects are a waste of time and can engender enmity on the part of the recipient nation.

Another measure that promises to enhance international cooperation is the SAFE WEB legislation that Congress adopted in December 2006.²⁰ Among other provisions, this enactment greatly expands the possibilities for the FTC to have foreign governments send their officials to work inside our agency and to have our employees work on assignment inside foreign agencies. Under the supervision of Jim Hamill in the International Affairs group, the FTC has developed an initiative called the International Fellows Program. By virtue of this program, the FTC now has a number of superb professionals from foreign agencies working at our offices in Washington. They work on cases, policy projects, and activities relating to the FTC’s participation in international networks. At the same time, we have begun seconding the FTC’s professionals to work overseas in other agencies. I look forward to the time when, at any one moment, we have 15 to 20 professionals from foreign governments working with the FTC in our offices in the United States, and we have 15 to

²⁰ Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers Beyond Borders Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372.

20 of our professionals working with our competition and consumer protection counterparts overseas. The best way to build this program is to grow incrementally—to do prototypes to show that the project works. This endeavor has enormous capacity to increase the transfer of know-how between competition agencies, to improve cooperation on specific matters, and to provide the human glue that is really indispensable to forming good relationships with other agencies over time.

I would emphasize that, for the most part, the commitment of FTC resources to international cooperation and convergence activities contributes only indirectly to the better development and pursuit of cases. These commitments are best seen as capital infrastructure investments. A system for evaluating the performance of the FTC or any other competition authority that focuses simply on how many cases the agency has brought isn't going to pick up or credit these types of investments. Our competition policy system requires acceptance of a norm that says these capital investments deserve serious attention, and that the willingness of an agency to make them is one of the key indications that it's doing a good job.

ANTITRUST SOURCE: Are there specific achievements or notable accomplishments related to international convergence that have resulted from your pursuit of these efforts over the past several years?

BILL KOVACIC: We see excellent results in a number of areas for both competition and consumer protection. These include the formation of the ICN and the improvement of programs at existing bodies, such as the OECD and the International Consumer Protection Enforcement Network, for multilateral international collaboration. Other prominent illustrations include the enhancement of region-wide initiatives, such as the work that we do with our NAFTA counterparts in Canada and Mexico, the improvement of bilateral relationships, and expanded technical assistance programs. In all of these measures, the FTC and its international counterparts have taken long steps towards reaching a better understanding of how our individual systems operate. Without that kind of understanding, I don't think we will get very far in achieving the adoption of common analytical frameworks or procedures. At a very minimum, these initiatives have greatly increased interoperability across systems. The systems talk to each other much more effectively now because they now understand better how other competition and consumer protection systems operate.

A further useful consequence is a great deal of success in achieving international agreement with respect to specific types of procedures or processes. From the very creation of the ICN, Randy Tritell played the central role in orchestrating the formulation of the network's recommendations concerning merger review. The ICN's progress in promoting the acceptance of better practices for merger notification is directly attributable to the investment that the FTC and other competition authorities have made in building a consensus around superior standards. For the best example outside the merger context, one sees much greater cooperation and consistency of processes and techniques in the enforcement of prohibitions against cartels. In this regard the Department of Justice has played the leading role.

The most noteworthy area of substantive divergence at the moment is the treatment of single firm behavior. Even there the international networks are laying a necessary foundation for getting beyond the slogans and clichés that too often substitute for a deeper understanding of why individual jurisdictions have done things the way they have. The ICN unilateral conduct working group and the OECD's competition committee have devoted greater attention to the discussion of substantive standards and analytical methods related to dominant firm conduct. It's a long, long

way to Tipperary to get general agreement on what some of those techniques and standards ought to be, yet progress toward achieving broader agreement cannot begin unless there are frameworks in which difficult substantive issues are going to be discussed. Those frameworks are now coming into being, and that is a promising development for the long term.

Another area in which I see demonstrable progress involves operational issues—questions such as how do you design your agency; how do you evaluate the effects of past intervention; how do you choose the programs you're going to pursue; by what means do you select a strategy; how do you communicate information within your agency to outside constituencies; and how do you engage in good competition advocacy? These issues weren't even on the table for most competition authorities in the context of bilateral or multilateral discussions a decade ago. They're on the agenda now in a powerful way. For example, the key question of how to evaluate programs and individual interventions now routinely appears in discussions of what competition agencies ought to do. We're seeing not just a discussion of broad analytical concepts, but also key operational issues that are crucial to applying the concepts in practice.

If you look at the mix of what competition agencies did in the major multinational gatherings in the past, there was an enormous emphasis on what might be called the physics of competition and consumer protection policy. There was far too little discussion of the engineering by which the concepts were going to be implemented in the routine operation of a competition or consumer protection agency. The mix of concerns addressed in international networks now shows a far more appropriate balance between physics and engineering, or between architecture and plumbing—whatever metaphor one wants to use. The public agencies are now spending much more time in this decade talking about key practical issues of how you actually get things done.

ANTITRUST SOURCE: Let's shift back to the domestic sphere and talk about the issue of domestic coordination. What are your views on the level of coordination between the FTC and the Department of Justice's Antitrust Division?

BILL KOVACIC: Not a day goes by when the Antitrust Division and the FTC aren't working together on a significant project. Those things take place routinely, they take place with a great deal of success, and they produce good results for the U.S. and international competition policy systems. There are a number of opportunities to expand and improve that cooperation. To take one example, the clearance process by which the agencies avoid duplication of effort with respect to the specific matters is quite worthy of a rethink. There will have to be a three-way negotiation between the Antitrust Division, the FTC, and the Congress. Nothing will happen without the blessing of the congressional committees that oversee the two federal agencies. That's an area in which an important source of friction in the relationship between the FTC and the Justice Department can be reduced dramatically. The number of smash-ups in the clearance process is relatively small, given the total volume of matters that the agencies clear to each other, but the individual smash-ups are costly to the parties that deal with us, and they diminish effective cooperation between the agencies. So that's a valuable area for improvement.

Another pursuit that appeals to me is to take greater advantage of the experience that resides in each agency, and to pool it with respect to matters of common concern. The agencies' case handlers should work together to address a number of frequently encountered questions: What are you finding to be effective methods of investigating a specific merger? What are good techniques for doing interviews? What information sources tend to be the most illuminating? How should conceptual issues associated, for example, with defining markets and measuring market

power be treated? At the moment, if you take the example of merger enforcement, you have two institutions that look at hundreds of transactions during an individual budget cycle. They accumulate a lot of experience about how to analyze a merger in terms of substance and to investigate a merger in terms of technique. The two agencies spend far too little time pooling that experience and discussing how our individual experiences in looking at specific matters can be linked together to improve the results. There are tremendous opportunities for improved performance between the agencies by teaming to conduct that kind of regular assessment.

ANTITRUST SOURCE: What kind of coordination, or changes in the level of coordination, do you see with state attorneys general?

BILL KOVACIC: For the last couple of years, the FTC and the states have been experimenting with deeper forms of collaboration. One can see some of the results of these efforts in our recent successful effort to block the Inova/Prince William County Hospital System transaction, with the Attorney General of Virginia joining the case side by side with the FTC.²¹ I regarded the support of the Virginia AG to be enormously valuable, and the insights of the Virginia antitrust team greatly strengthened the case against the merger. I can tell similar stories of effective cooperation between the FTC and the states involving pharmaceutical products.

On the whole, I would say the case-by-case cooperation between the FTC and the state governments has never been better. The examples of recent cases I just mentioned are powerful illustrations of how important that cooperation is. For years I have thought there are important frontiers for greater federal-state collaboration. The United States should have the equivalent of the European Competition Networks by which the European Commission works with the Member State competition authorities. We should have a domestic competition network that facilitates deeper integration of effort across a variety of the areas—litigation, case formation, research, and advocacy.

As a rough precursor for this type of measure, for the past two years the FTC and the states have conducted a day-long workshop in the fall. The first workshop focused on petroleum products and the second dealt with pharmaceutical sector issues. The FTC and the states are preparing another workshop for the coming fall to examine issues associated with mergers in the retail sector. In these projects, there is an enormous possibility for improved performance by having the FTC and the states building a more elaborate network that looks at common analytical concerns and addresses practical needs, such as training and investigative techniques. Over time, it is a network in which a variety of other public authorities at the federal and at the state level might participate.

Why do I think this is so important? This is a key frontier on which individual agencies can improve productivity. This type of cooperation offers a useful path to pool resources, to get smarter, to devise a common research agenda, and ultimately to pursue cases and advocacy more effectively. This is an area in which the public agencies collectively can improve their performance. Our experience in the area of consumer protection shows the way. Earlier this year the FTC, many state attorneys general, the Department of Justice, several U.S. Attorney's offices, the U.S. Postal

²¹ Press Release, Virginia Office of the Attorney General Joins FTC in Motion for Preliminary Injunction in Proposed Inova Health System and Prince William Health System Merger (May 9, 2008), available at http://www.oag.state.va.us/PRESS_RELEASES/NewsArchive/050908_Inova.html.

Inspection Service, and the Government of Canada jointly announced the results of a collaborative enforcement effort to attack fraudulent telemarketing. Called Operation Tele-PHONEY, the multi-agency enforcement sweep generated 120 enforcement actions.²² The sweep was the fruit of elaborate cooperation among law enforcement authorities in the United States and Canada. This was the first time the U.S. consumer protection enforcement authorities had cooperated so extensively with Canada to carry out a sweep and prosecute individual cases. That couldn't have happened ten years ago. It took place this year because of elaborate, long-standing efforts between FTC consumer protection officials, Canadian consumer protection officials, the Department of Justice, the U.S. Attorney's offices, and state governments to pool resources to achieve better results.

There is an unmistakable lesson from the FTC's recent experiences. For competition policy and consumer protection, deeper integration among the public institutions, rather than having individual agencies act alone or with limited cooperation, is going to be crucial to improving performance.

ANTITRUST SOURCE: On the Consumer Protection front, one of your major priorities as the FTC's General Counsel was to continue to develop the FTC's role as both a competition authority and a consumer protection agency. As Chairman, how have you modified, if at all, your perspective on advancing those dual roles?

BILL KOVACIC: I am even more convinced than I was four years ago that the FTC can improve its performance significantly by building stronger links between the competition and consumer protection dimensions of its statutory mandates. Several examples come to mind. A better understanding of the demand side—a better understanding of how consumers behave—of the typical competition problem is going to be valuable to us. Efforts to focus more closely on how consumers respond to information and how they absorb information will be increasingly valuable to the FTC in analyzing the correct competition policy response.

At the same time there are ways in which a fuller joining up of competition and consumer perspectives can improve the FTC's treatment of variety of issues that traditionally have arisen on the consumer protection side of the agency. The FTC is becoming more skilled at asking questions about whether the market failures we observe stem from information failures associated with the disclosure or non-disclosure of information to consumers, or result from too little competition among individual providers that supply certain product offerings or information to consumers.

Another respect in which the FTC is seeing how the greater unification of the two areas can provide good results is in the understanding of the role of intermediaries which assist consumers in navigating difficult transactions. That is where information is very dense and complex, where intermediaries can act to educate and guide consumers in their choices. The FTC can play a valuable role in protecting competition among those intermediaries and removing artificial barriers to their participation in the market. An early prototype of this kind of approach appears in the FTC's lawsuit in the 1970s and 1980s against the Indiana Federation of Dentists.²³ The boycott in *IFD* was

²² Press Release, FTC Announces "Operation Tele-PHONEY," Agency's Largest Telemarketing Sweep (May 20, 2008), available at <http://www.ftc.gov/opa/2008/05/telephoney.shtm>.

²³ *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).

designed to deny consumers the benefit of efforts by insurers to explore whether or not certain dental services were being provided at an optimal price.

More than ever, having a conscious process by which individual observed problems are evaluated both from the supply side—which is traditionally the competition portfolio—and the demand side—which has been the province of consumer protection—becomes important to what the FTC does. Recognition of this condition compels the agency to take more steps internally to ensure that connections between our competition and consumer protection capabilities are drawn. I detect an international trend toward having government agencies combine both functions. Over thirty jurisdictions around the world do so today. Many, such as the United Kingdom's Office of Fair Trading, are engaged in exciting experiments to explore how best to exploit synergies between these two areas of concern.

*More than ever, having
a conscious process
by which individual
observed problems
are evaluated both from
the supply side—which
is traditionally the
competition portfolio—
and the demand side—
which has been the
province of consumer
protection—becomes
important to what the
FTC does.*

ANTITRUST SOURCE: Are these two roles ever at odds with each other?

BILL KOVACIC: The cultures of the two fields sometimes conflict. For example, with respect to advertising and marketing, traditional consumer protection perspectives might lead an agency to impose increasingly powerful limits on what firms can do out of fear that anything short of representations that are pristine in their accuracy and precision may mislead consumers. From this perspective, consumers can come to be seen as especially fragile and prone to manipulation. The competition policy discipline provides an important challenge to this perspective. It warns that if an agency imposes ever more restrictive standards concerning advertising and various forms of marketing practices, it is possible that the agency will stifle the rivalry and new entry that are important sources of protection for consumers.

So there are instances in which the analytical perspectives and the culture of the different disciplines can sometimes create friction between them. To recognize the limitations of each perspective and to see that those perspectives are joined up in shared analytical processes is a good way to ensure that neither becomes blind to considerations that the FTC ought to take into account.

ANTITRUST SOURCE: There have been various activities, including testimony before Congress and a recent conference hosted by FTC staff economists, related to subprime mortgage borrowers and strategies for effective mortgage information disclosure. What role do you see the FTC playing in the current subprime mortgage crisis?

BILL KOVACIC: One critical dimension is enforcement. Going back over several decades, the FTC has had an enforcement presence with respect to what I earlier referred to as the complete life-cycle of financial services transactions. At the front end of the life cycle are the advertising and marketing of financial services products, including subprime mortgages, and the formation of agreements with respect to the provision of specific financial services. At the other end of the life-cycle, for transactions that go poorly, the FTC examines practices related to debt collection, debt relief, and mortgage rescue plans. Perhaps there is no more important application of the FTC's consumer protection authority today than the enforcement of legal commands relating to this whole life cycle of activity.

Our top priority is to challenge fraud, misrepresentation, and related forms of overreaching by applying the deception and unfairness components of our consumer protection authority. For example, the FTC today has a significant portfolio of enforcement matters that allege misrepre-

sentation in the provision of financial service products, including our recent case with the Federal Deposit Insurance Corporation involving CompuCredit.²⁴

The second critical dimension is the process of building knowledge about developments in the financial services sector. We do this through our own research efforts and by using public consultations in the form of conferences and workshops to learn more and to stimulate public debate and discussion about the phenomena in the subprime market. The conference convened by the FTC's Bureau of Economics earlier this year on disclosures and mortgage lending was an extraordinary useful contribution to our understanding about commerce in the subprime market. A trademark of the modern FTC is its proficiency in convening public discussions that shed more informative light on specific phenomena and draw attention to research performed inside the agency and by scholars from other institutions.

We have a number of ongoing research projects that deal with financial services. One of the most important questions for us is how individual consumers absorb information? How do they understand disclosures embodied in a dense thicket of information? The recent report that Jan Pappalardo and Jim Lacko of our Bureau of Economics issued on mortgage disclosures presents highly important empirical work to test how people interpret and perceive disclosures associated with routine financial transactions.²⁵ Efforts to invest in building knowledge about the subprime market and other features of the financial services sector assume increasing importance, whether in connection with the FTC's contributions to the consideration of legislative proposals, to inform the FTC's rulemaking activity, or to guide the Commission's enforcement work.

ANTITRUST SOURCE: You've talked about the Bureau of Consumer Protection and the initiatives that you see taking place with respect to enforcement. Do you see any specific initiatives concerning policy or enforcement with respect to the Bureau of Competition?

BILL KOVACIC: I anticipate a continuation, and perhaps expansion, of our efforts in several areas. Areas in which we have significant matters currently in litigation involve agreements between producers of branded pharmaceuticals and producers of generic equivalents to delay entry by the generics; litigation involving standard setting, including the prosecution of the appeal in the *Rambus* case; and the development of new cases involving standards.

I also expect to see the continued pursuit of cases involving services in critical economic sectors such as real estate. I see the FTC sustaining and perhaps expanding our litigation presence in all of these areas. Other areas where I expect the FTC will continue to have significant involvement in the months and years ahead involve services such as health care. I foresee a continuation of FTC efforts to clarify doctrine involving merger policy through our administrative process and in the courts.

A further significant area involves exemptions and immunities. Keen areas of concern for me include the role of the state in displacing competition through the state action doctrine, the scope of immunity for efforts to elicit government intervention that suppresses competition, and the boundaries of jurisdictional limits to the FTC's authority.

²⁴ See *supra* note 18.

²⁵ James M. Lacko & Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (June 2007), available at <http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf>.

ANTITRUST SOURCE: Looking at today as well as into the future, what are some of the lasting influences of the policies and agendas for which you advocated as General Counsel of the FTC?

BILL KOVACIC: One concern I mentioned four years ago was the use of our administrative process to clarify doctrine. That continues to be a very significant application of the FTC's resources. On the whole, I am pleased with the results the agency has achieved in this decade. In the past seven years, the FTC has been before the courts of appeals in non-merger matters on six occasions. Four generated results that the agency finds satisfying. Those are *PolyGram*,²⁶ *Kentucky Movers*,²⁷ *South Carolina State Board of Dentistry*,²⁸ and *North Texas Specialty Physicians*.²⁹ The FTC lost its case in *Schering*,³⁰ and *Rambus* remains on appeal.³¹ To my mind, administrative litigation continues to present tremendous opportunities for the FTC, applying its own distinctive institutional capabilities, to develop antitrust doctrine.

I also anticipate that the FTC will make a greater investment in improving links across government agencies at home and abroad, and exploring additional partnerships with non-government organizations such as university research centers.

A second aim we spoke about in the interview four years ago is to gain acceptance for a norm that encourages the FTC to make substantial, continuing capital outlays for research and development. I see that happening in everything the FTC does today. Sustaining this norm is a key priority of mine, especially with respect to outlays for empirical studies. This includes more expenditures of resources to evaluate past initiatives, and investments in gathering knowledge by means of seminars, workshops, hearings. All of these activities require a significant commitment of resources by the FTC and acceptance by the larger competition policy community as being necessary elements of good agency practice

As mentioned earlier, the deeper synthesis of our competition and consumer protection work is something I also see as continuing. I also anticipate that the FTC will make a greater investment in improving links across government agencies at home and abroad, and exploring additional partnerships with non-government organizations such as university research centers. Better ties to academic institutions could improve our access to the knowledge we need to do a good job and help strengthen our human capital. How to sustain the quality of our workforce is a critical question in the FTC's self-study.

Will the types of steps I have described here last? My hope is that new management at the FTC, whoever it is, under the new president will see these measures as valuable. Since 1950, the history of the FTC is that new presidents from either party, when they inherit a vacancy on the Commission, tend to appoint their own Chairmen. I hope that a new chairman and new commissioners will see that all of these investments serve to improve the agency and are critical to the institution's future success. I hope that they and the larger competition community will recognize these undertakings as being indispensable to building a strong substantive foundation for the agency in the decades to come.

I see it as my obligation in the months ahead to seek to persuade our larger community and new agency leadership that this is the path to institutional success for the Commission.

²⁶ *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

²⁷ *Ky. Household Goods Carriers Ass'n, Inc. v. FTC*, No. 05-4042, 2006 WL 2422843 (6th Cir. Aug. 22, 2006).

²⁸ *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006), *cert denied*, 127 S. Ct. 1123 (2007).

²⁹ *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

³⁰ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert denied*, 548 U.S. 919 (2006).

³¹ *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

ANTITRUST SOURCE: Over your long career, you've been a student, teacher, adviser, and analyst for many non-U.S. competition authorities, including developing competition authorities. Based on your deep experience with so many institutions, is there anything that you haven't talked about today in terms of how you build an institution, how you bring an institution into the future, or how you continue to keep an institution important to a society that you'd like to mention?

BILL KOVACIC: One of the most important lessons is that so much depends on building a good institution and that the quality of the substantive results that a competition or consumer protection agency delivers hinges so much on the design of the institution and refinement of the operational techniques and methods by which the agency carries out its work. Good institution-building requires an agency to bring the same intensity of effort that it applies to the development of substantive doctrine to the continuous improvement of capacity. Good agency structure and operations count for just as much as skill in deciding what conceptual framework provides the best approach for deciding whether a merger will have anticompetitive coordinated effects.

I am convinced to

the point of moral

certainty that a crucial

determinant of the

quality of the

substantive results

that an agency

generates over time

is the level of attention

given to institution-

building itself.

There's an overwhelming tendency in our antitrust history to focus on key questions of doctrine and broader conceptual issues at the expense of assessing the skill of the institutions that execute the policy commands. The main lesson I derive from my experiences in transition economies, and the huge amount of time I've spent with our more experienced counterparts in other countries, is that this imbalance must be corrected. I am convinced to the point of moral certainty that a crucial determinant of the quality of the substantive results that an agency generates over time is the level of attention given to institution-building itself. The requisite commitment to institution-building, for agencies old and new alike, takes the form of investments in building knowledge, investments in evaluation, investments in accumulating and retaining good human capital, and investments in improving cooperation and collaboration with other public institutions. Without a conscious effort to build these institutional foundations, good programs and good substantive results will not be routinely attainable. As one academic colleague has put the point, you can't hope to deliver broadband quality policy results over dial-up institutions. It cannot be done.

The dilemma for our public policy-making system is that the criteria by which agencies typically are evaluated and assessed focus almost entirely on rates of enforcement and rulemaking activity: How many cases have you brought, and how many new rules have you issued? In this scheme of assessment, capital investments that increase institutional capacity don't count for much. The traditional case- and rule-centric report card gives incumbent leadership little incentive to make capital investments. The decision to invest in building knowledge, the decision to improve organizational form, and the decision to build better networks with other government authorities at home and abroad are all decisions about making capital investments. The investments in question generally yield returns that are invisible to many observers on the outside, and the returns they generate often are realized after the managers who ordered the investments to be made have left office. The returns will not be appropriated by the incumbents who make the investments; they will flow mainly to future management.

The FTC has prospered in recent decades because individuals with relatively short-term political appointments made long-term investments. This commitment to the agency's long-term success is an act of faith, a belief that laying a foundation for success tomorrow matters as much as victories achieved today. Few good things that the FTC does today are not the products of investments that my predecessors—Debbie Majoras, Tim Muris, Bob Pitofsky, and Janet Steiger—made over the past two decades. The key question that ought to be pressed upon me and others who hold this job is, what are you doing today to enhance your successor's capacity to do

good work five years from now? Our political culture does not provide strong incentives for those matters to be considered.

And if you look at popular discourse today about whether the Federal Trade Commission or Department of Justice is doing a good job, it typically is distilled to a single variable: what's the output of cases?

ANTITRUST SOURCE: Is there anything else that you would like to add for our readers as it relates to the FTC as an institution?

BILL KOVACIC: In our competition and consumer protection work, a further objective that interests me is to explore additional ways to address conditions of economic disadvantage. This is partly a consequence of having spent many years working with competition and consumer protection agencies in transition economies, where the aims of poverty reduction and economic growth are paramount policy concerns.

When I look at much of what the FTC has done well in my most immediate experience at the Commission, a great deal of that effort is involved in what I would call assisting economically disadvantaged populations. In the *South Carolina State Board of Dentistry* case,³² the Commission's intervention made fluoride treatments more widely available to children who attend school in poor school districts in South Carolina. In its advocacy efforts, the FTC has challenged unjustifiable restrictions on entry that ostensibly are established to bar the unauthorized practice of law. The FTC's intervention has made vital professional services more broadly available to those with lesser incomes. The FTC's Hispanic Language Initiative challenges fraudulent schemes that target Spanish speakers, many of whom have lower incomes.³³

I think a useful question for the FTC looking ahead is how these very useful projects might serve as models to develop other initiatives that promote consumer welfare, with special benefits to populations beset by economic hardship. How can the FTC extend and develop projects that have uniquely powerful advantages for the less affluent members of our society?

As a consequence of time spent in transition economies, I ask more generally what sorts of things the FTC can do to address conditions of economic disadvantage? How can our advocacy programs, our competition enforcement, our consumer protection enforcement program, and our public education efforts contribute to the reduction of poverty? When you look at the portfolio of work that this agency has pursued over time, a striking number of matters have advanced this objective. I think something quite useful that we can do is to continue to explore these possibilities. Inside our own house we have a number of matters under consideration that would serve that purpose. If the United States can devote useful efforts to poverty reduction through the delivery of good consumer protection and competition programs overseas in transition economy environments, there are lessons we can learn from that experience to do the same thing at home.

ANTITRUST SOURCE: One of the things that you talked about earlier is trying to decouple the FTC's longer term planning horizon from the electoral cycle. Depending on what happens in November, do you anticipate any significant changes?

³² *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006), *cert denied*, 127 S. Ct. 1123 (2007).

³³ Press Release, FTC Continues Campaign to Stop Scams Aimed at Hispanics (Jan. 24, 2006), available at <http://www.ftc.gov/opa/2006/01/ohiorelease.shtm>.

BILL KOVACIC: A new chairman and new agency leaders in the FTC's operating units and support groups inevitably bring new ideas, either to refine existing programs or to begin new projects. This tends to provide a useful infusion of new perspectives into the FTC. That's a healthy part of our system. For this reason alone, with any change of leadership, there will be some change in the mix of what the FTC does.

Beyond these types of changes, I expect a new president and the FTC leaders he will appoint to look at the portfolio of what the Agency has done in this and earlier decades, study this experience carefully, see the incremental development and adaptation of its work, and will say, "That's an extraordinarily good program." I hope the president and his appointees will see that the FTC is second to none globally as a competition authority and as a consumer protection authority. I hope they will understand how the agency has strived across the tenures of several chairmen to become the kind of agency Congress intended it to be. I hope they'll look at the programs that have given the FTC an exceptionally strong reputation and say, "These are excellent programs. They would have been excellent programs ten years ago, and they will be seen as excellent programs ten years from now. Our job is to sustain, enhance, and extend them in addition to bringing new ideas to the agency."

So I generally expect, because I have looked from every possible direction at what we do, and I have studied the record of achievement that the FTC has amassed through policy innovation and a skillful incremental improvement in its programs over decades, that new leadership will examine the FTC and say, "That's a great institution with many outstanding programs. I want to continue that excellent level of performance. I've got some new ideas, as well. In pursuing them, I realize that I'm building on an extraordinarily good foundation."

I expect the vision I have described here ultimately will come to pass. One development occasionally causes me to question this prediction. In some discourse about the FTC, I detect a felt need to depict what the agency has done, especially in this decade, as being severely deficient. I think that's a horribly misguided, exactly wrongheaded assessment of what the FTC has done. If that theme is repeated often enough with enough conviction, time and time again, it could create the expectation on the part of new leaders that they have to turn FTC upside down in order to make it effective. That would be a tragic development.

ANTITRUST SOURCE: You have provided superb insights on where the Agency is going and what we can anticipate in the future. Thank you very much for talking with us today. We are very appreciative that you've chosen to share your thoughts, yet again, with *The Antitrust Source*.

BILL KOVACIC: I am most grateful to have the chance to do this. Thank you for the opportunity to contribute. ●