

Interview with Deborah P. Majoras, Chairman, Federal Trade Commission

Editor's Note: In this interview with the Antitrust Source, Deborah Platt Majoras candidly talks about her plans for the Federal Trade Commission. Chairman Majoras discusses her goals and priorities for the Bureau of Competition in both merger and non-merger enforcement, as well as her enforcement objectives in the increasingly global area of consumer protection. She also highlights the importance of the FTC's policy and advocacy programs in its overall mission of protecting consumers and competition.

Ms. Majoras was sworn in as Chairman of the Federal Trade Commission on August 16, 2004. This is her second time in public service. From 2001–2004 she was with the U.S. Department of Justice Antitrust Division, first as Deputy Assistant Attorney General and then as Principal Deputy. During her three year tenure at the Antitrust Division, she oversaw matters involving numerous industries, including software, financial networks, defense, and media and entertainment. She also served as Chair of the International Competition Network's (ICN) Merger Working Group and oversaw policy initiatives, such as the FTC/DOJ Health Care Hearings, the DOJ's Merger Review Process Initiative, and the Mergers Best Practices Project.

Ms. Majoras joined the FTC from the law firm of Jones Day, where she was a partner in the firm's antitrust section, and a member of the firm's technology issues practice. She is a member of the American Bar Association's Section of Antitrust Law, where she recently served as Vice Chair of the Section 2 Committee and as a member of the Long-Range Planning Committee. Ms. Majoras also served as a non-governmental advisor to the ICN and was named by President Bush to serve on the Antitrust Modernization Commission, a position she was required to resign when she assumed the duties of FTC Chairman.

The Antitrust Source conducted this interview on March 4, 2005.



Deborah P. Majoras

ANTITRUST SOURCE: You assumed the Chairmanship of the Federal Trade Commission in August, so you are about seven months into this now. We appreciate your willingness to talk to us at this relatively early stage in your tenure. Let's begin by talking about resources that you have to work with. Do you have any plans for shifting the allocation of your resources among the Bureaus of Economics, Competition, and Consumer Protection in terms of the staffing, employees, and numbers?

MAJORAS: No. I have no current plans to do any major reallocation of resources. I have been fortunate enough to take over the leadership of an agency that I think is functioning quite well and, from what I can tell so far, allocating resources in a way that is very effective.

ANTITRUST SOURCE: The proposed '06 budget for the FTC is essentially at the same level as it is for '05. Do you plan to cut any programs or to initiate any new programs based on your projected budgeting levels for '06?

MAJORAS: As you know, these are going to be somewhat lean times for government agencies generally, and agencies are being asked to be cautious and tighten their belts. But we are, relatively speaking, doing very well in the budget process. We work very closely with Congress, particularly on the consumer protection side. We have a lot of programs that are very important to Congress, and we cannot keep doing our work on them all if we do not have the funds. In addition, one could argue that our total budget is a rounding error compared to the overall U.S. budget. Overall, we

are doing well, and we have no plans to make cuts. Now, if we are asked by Congress to add any significant additional programs, then we will need to ask that they be funded.

ANTITRUST SOURCE: There have been some recent announcements of changes in leadership positions at the FTC. For example, Jeff Schmidt has come in as a Deputy Director of the Bureau of Competition, and Jeff Brennan has moved from the Health Care Unit to become Associate Director of the Bureau of Competition. Can you explain how their responsibilities will be allocated within the front office at the Bureau of Competition?

MAJORAS: I generally leave that to Susan Creighton, who is my very able Director of the Bureau of Competition, although she and I do talk a fair amount about the organization. Jeff Brennan will serve as a liaison between the Bureau of Competition and the regional offices on competition matters, but he also is going to have other responsibilities. He really will be functioning as Susan's third deputy. For example, we have put Jeff in charge of the initiative to produce, with the Department of Justice's Antitrust Division, a commentary on the Horizontal Merger Guidelines. Jeff Schmidt will help Susan in a wide variety of areas. In particular, he will assist her in supervising investigations, managing litigation, and preparing enforcement recommendations for the Commission. Beyond that, we are becoming quite busy in the Bureau of Competition with the recent mergers that have been announced, so I expect that Susan is delighted to have two able new folks to add to her team.

I would also like to add that Bill Blumenthal has recently been appointed General Counsel of the FTC. The General Counsel's Office handles not just a wide array of litigation matters, but also undertakes important research and policy development projects. I am delighted to have him at the helm there.

ANTITRUST SOURCE: What if anything can you tell us about any anticipated future staff changes in the near term at the Federal Trade Commission?

MAJORAS: Rosemarie Straight, our excellent Executive Director, has retired, so her deputy, Judy Bailey, is currently serving as Acting Executive Director, and we are in an active search for a replacement for Rosemarie. That position may be the most important job in the building, including mine. As far as other positions go, I was lucky enough to have almost the entire senior staff who worked for former FTC Chairman Tim Muris stay on with me during the transition and beyond.

ANTITRUST SOURCE: Let's turn to the FTC's merger program. Are you planning to make any changes in the second request issuance process, for example, in particular investigations?

MAJORAS: I would like to see second requests customized for each investigation. It is something that I worked on when I was at the Department of Justice. As you know, I have initiated a merger process reform project here at the FTC, and I have put together a large committee drawing from the merger shops in the Bureau of Competition, from the General Counsel's office, and from the Bureau of Economics. We are going to be looking at a number of things to improve the process. I am not fond of issuing essentially the same broad second request in every instance and then waiting for the negotiation process to tailor it. The negotiation process is, of course, important, because we do not know all the facts we would need to know to tailor it in the first instance. But I think in most instances, some tailoring can and should be done early.

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ANTITRUST SOURCE: Are there any particular steps you have in mind in terms of streamlining the process specifically or are we at the planning stage right now?

MAJORAS: I think we are at the planning stage. I definitely have ideas, and I am passing them along to the committee. But I want the staffers who are doing this on a daily basis to be involved in establishing what some of the best practices are, so I would rather wait until we have done a little bit more work on it before I give the specifics.

In the meantime, though, let me give you an example of the type of reforms we might consider. When I was at the Justice Department, we examined the respective incentives of the agency and the parties in a merger investigation. We asked ourselves what the two sides of any merger really want. The parties typically want some specificity on the timing, and, of course, they want it to happen as fast as possible. They also would like to have their burdens lessened. The agency wants to get information as quickly as possible and have time to review it. In light of this, one of the things that we did at DOJ was to empower the chief to enter into letter agreements and make deals. For example, at the FTC, the staff could promise the parties a meeting with the Bureau Director by a date certain if the parties promise to produce, say, the pricing data by a fixed date and finish their production by a fixed date. At DOJ, we found that those deals could be very effective because people felt that their cooperation was being rewarded. I think that using a little creativity can go a long way toward streamlining the process.

Here is another idea for streamlining the process: If it appears at the beginning that one issue might be determinative but we are not certain, we could perhaps take all the other issues and put them on the backburner and have a production made just on the determinative issue. If it turns out to be determinative and we do not need to go any further, then we have not wasted our time on other things. Methods like these and others, I think, can improve the process.

ANTITRUST SOURCE: How do you think the FTC and the DOJ are managing the efficiency and timeliness of the clearance process currently? Is there room for improvement?

MAJORAS: Yes, I think there is room for improvement. The clearance process goes up and down. Most of the time, it works very well and very effectively. I think if the merger stream continues the way it seems to be, there will be plenty of work for everyone to do, and that will help matters. But Assistant Attorney General Hew Pate and I have been working to try to improve the process, and we will continue to work at it. The competition between the agencies for work is a good sign in some ways: it shows that our agency lawyers are very, very excited about working on particular deals. But the bottom line on clearance is that both agencies are highly capable of examining deals and examining conduct cases. We need to be clearing cases efficiently, particularly when we have a merger clock, so that we can do our work for the public and not fight with each other.

ANTITRUST SOURCE: Has there been any effort to restart the attempts to come up with a new clearance process—sort of rules of engagement?

MAJORAS: No, not really. From time to time, we talk about tweaks here and there, but the basic rule—that experience in the relevant product market is the key factor in determining who gets clearance—is still in place. Incidentally, the provision in the appropriations bill that forbade us from executing the abandoned clearance agreement has been removed. However, as I said during my confirmation hearing, I will not reinstitute that particular agreement.

ANTITRUST SOURCE: You announced that the FTC and the DOJ are going to produce a commentary on the 1992 Horizontal Merger Guidelines sometime in 2005. Can you tell us anything more about how the commentary is being developed—what the approach is, who is doing it, the process, or anything else?

MAJORAS: I have put together a task force of folks from the Bureau of Competition, the Bureau of Economics, and the General Counsel's office—with Jeff Brennan at the helm—to work with the Justice Department to come up with a commentary on the Horizontal Merger Guidelines. Because we want to produce a commentary on what we really do in merger review, I think it is very important that the folks who are reviewing mergers have a lot of input and that this not be just a Chairman-imposed or Bureau-imposed project. We are looking at all the major areas of the Guidelines. We are drawing on all our years of experience with these Guidelines and on the 2004 Merger Workshop to try to enlighten folks on how we are using the Guidelines to review mergers.

ANTITRUST SOURCE: Do you anticipate that the commentary will address any new areas or new issues, for example, how intellectual property would fit into the analysis of a merger review?

MAJORAS: It is possible that it could. I do not want to say exactly what is going to be in it yet, because we have not made all of those determinations. But there is no question that reviewing mergers involving intellectual property has become a much more common exercise now than it was in 1992, when the Horizontal Merger Guidelines were issued. It might make sense to discuss how those mergers are reviewed and whether there is anything different about the review.

ANTITRUST SOURCE: Let's talk specifically about the timing of entry. Two years may be a lot for one industry and actually a little for another. Do you anticipate that the commentary would potentially come out with any guidance that would indicate that the agency has flexibility in the time test in the Guidelines, perhaps as it relates to specific industries?

MAJORAS: I do not know whether we will be that specific. There may be an explication of relevant factors that go into assessing the time period. It is possible that some industries can provide examples. Obviously, we have learned a lot about that entry question over the years. I am not certain, however, that it would be as specific as a true industry-by-industry analysis.

ANTITRUST SOURCE: Let's talk about the recently appointed Associate General Counsel for Energy. Will that position be involved in reviewing oil industry mergers and investigations or is it more of a policy advocacy position or is it a combination of everything?

MAJORAS: It really is a combination. I am delighted that John Seesel agreed to take the position. As you know, he is a long-time FTC lawyer and highly respected both inside and outside the agency. He is really tackling the position with a lot of vigor. His role is to coordinate all of our efforts in this industry, not only on the competition side but on the consumer protection side. He is advising us on merger and conduct investigations, on policy, on any legislative efforts, and any consumer education efforts. He is even involved in some of the Federal Energy Regulatory Commission advocacy work that we do on electricity. As you know, energy is a very significant area for the FTC, and we have pieces of it all around the agency. John acts as the focal point to ensure that we are staying on top of every aspect of energy policy, and that we are coordinating

it all so that our work is consistent. We have a lot of inquiries in this area from Congress and from interest groups, and he can help us make sure that we are being responsive to those who are interested, particularly with respect to gasoline prices but also with respect to winter heating costs and the like. This is a major issue for consumers, and we want to treat it as such.

ANTITRUST SOURCE: In the *Arch Coal* and *Oracle* cases, the courts seemed to accord a low significance to customer complaints. Verified customer complaints have long been one of the key factors in deciding whether to challenge a merger. How do you think the FTC should reconcile this sort of difference between how the courts have recently looked at that and how the agencies and others have traditionally looked at it?

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MAJORAS: We have to take these cases seriously. As you may remember, I have long been a proponent of court involvement in our cases because I believe it is very healthy to have neutral judges taking a look at our work and our theories. With respect to these and other cases, particularly when one loses, it is very important to try to figure out what happened. We are not planning on backing away from customer testimony, and view it as a very important part of the analysis. We have been doing some research internally to further support our own belief that it is very important. I think what we likely need to do is not take for granted that a court will understand why it is important. We must work harder at not just putting customers on the stand or submitting their declarations; we must really explain to the court why this testimony matters and is relevant to the issues at hand.

ANTITRUST SOURCE: Let's shift focus now to the non-merger side of the Bureau of Competition, to the anticompetitive practices part of the mission. You inherited an agenda that placed a pretty high priority on anticompetitive abuses under the *Noerr-Pennington* doctrine, in the context of standard-setting activities and in pharmaceutical industry patent settlements. Do you intend to pursue more cases in these areas?

MAJORAS: It is always hard to say exactly which kind of cases we are going to pursue. But we do believe that there is still a fair amount of abuse with respect to government process and the like, so I think you can expect that we will continue to pursue these types of cases. I think we need to protect the integrity of government processes. I wish there were not so much fodder, but there is, so we will continue to investigate these cases.

ANTITRUST SOURCE: You inherited an agenda that focused a good bit on single firm activity. Will you be looking for incidences of collusion that might not rise to the level of criminal activity but should nonetheless be investigated civilly and prosecuted either under Section 5 of the FTC Act or under Section 1 of the Sherman Act?

MAJORAS: Of course. Horizontal conduct should always be high on the list for an antitrust enforcer. As you know, particularly with respect to physicians, the FTC has investigated a number of agreements that violate the antitrust laws. We would like to do a better job of trying to educate physician groups, because naturally we would rather cut down on the incidence of price fixing through ventures in which there has been no efficiency-enhancing integration. It is just surprising that despite the many cases we have brought, we still seem to need to get the message out. The bottom line is that I think you will continue to see us bringing these cases.

ANTITRUST SOURCE: Does the FTC have any programmatic interest in clarifying the law in the area of bundled rebates or loyalty discounts or other types of vertical price restraints?

MAJORAS: I think we all do—all of us in the antitrust community who care so much about this discipline. This is an area in which the law is not entirely uncertain, but *LePage's* revealed that there is enough uncertainty in this area that it is difficult to counsel clients. Vertical restraints, whether price or non-price, are an area in which the antitrust bar plays such a significant role in working with clients to avoid violations in the first place. Lawyers on the outside have said over and over that they are just not sure how they are now supposed to counsel their clients on bundled rebates. In addition, I think we in the antitrust bar and in the business community—not just in the United States, but worldwide—are engaged in a serious dialogue over monopolization/dominance. *Trinko* helps a lot, but there are still debates about the sorts of cases that should be brought, and about the test that should be used to evaluate these cases. I have been in a number of rather heated discussions on this topic, and I think you will continue to see a lot of discussions on it. Naturally, the FTC would like to be right in the middle of any public dialogue, contributing to clarifying this area of the law in any way we can.

ANTITRUST SOURCE: That's a good segue to the international area. What is your agenda on the international front for competition?

MAJORAS: I think we will continue to devote significant resources to our work in the international area. In fact, I think it will get to the point where international issues will simply be integrated into our everyday work, because it is hard to have a day go by anymore when I am not somehow engaged in a matter with a global aspect or having a meeting with someone from another jurisdiction. This area has just absolutely exploded, and we will continue to participate through several different means.

With respect to multi-jurisdictional forums, we will continue to be huge supporters of, and active participants in, the International Competition Network, which both U.S. agencies helped establish. It is an organization that, I believe, has accomplished a great deal in a short period of time. The membership has grown and continues to grow, and I think there is a lot that can be accomplished in that forum. We will also continue our work in the Organization for Economic and Cooperative Development, which is another important, slightly different multi-jurisdictional forum. We will continue funding through the U.S. Agency for International Development and the like in order to participate in technical assistance programs for jurisdictions with new competition regimes. The demand for this assistance exceeds our resources. There is just so much demand for help now from all of these countries that have brand-new regimes, so both we and the European Union are engaged in a lot of this kind of work.

We have very significant bilateral relationships, of course. The European Union is the most important of these, given that they are our most important trading partner. But we have no end of countries who are interested in strengthening bilateral ties with us, as we have more and more investigations that are overlapping. We do find a great advantage to having established some relationships upfront—before we are confronted with a joint investigation—because it helps us to work together. All of that, I think, is very important on the competition side. With respect to individual cases, we cooperate with the European Union, Canada, Japan, and other countries on such a regular basis now that it is fairly routine. The problem now is that when I give speeches about it, sometimes people look at me as though they are thinking, “Well, gosh, that is sort of boring.” Well,

maybe good government is boring. It has become very routine for our folks to work with other nations on joint investigations.

ANTITRUST SOURCE: Continuing on the international front, what is your agenda there for consumer protection?

MAJORAS: The international component may be becoming even more important on the consumer protection side. We are dealing with so much fraud perpetrated on the Internet, which of course is borderless, that we are working very hard to establish ties with jurisdictions around the world to work on fraud cases, identity theft cases, and a whole host of issues. It does not necessarily have to be fraud stemming from Internet and email use, but it often is. We are working hard on a piece of legislation that would give us much better tools to be able to combat cross-border fraud. We are very anxious to get that legislation passed because the fact of the matter is that, although I hate to say it, the fraudsters on the Internet are ahead of us. Unlike us, they do not have to worry about jurisdictional rules or borders or information sharing and confidentiality. They are just sitting on some offshore island defrauding U.S. consumers. We need better tools so we can catch up. Also, we have an organization similar to ICN, called the International Consumer Protection and Enforcement Network, which consists of consumer protection agencies from around the world working together on common issues like fighting spam or getting consumer redress in fraud cases. We also work on consumer protection in OECD.

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ANTITRUST SOURCE: How do you see guidelines and advocacy fitting in to the FTC's overall mission? By advocacy, I mean amicus briefs, business review letters, testimony at the state level or on the Hill.

MAJORAS: I think it is one of the most important things we do. It is often done at a relatively low cost, and yet if we can help to block an anticompetitive piece of legislation from becoming law, we can save consumers a lot of money. That is why I think you should expect to see even more advocacy coming out of the FTC, and, of course, we will do a lot of it with our friends at the Antitrust Division.

Our mission is protecting consumers. Some of that involves protecting consumers directly, and some of it involves protecting competition, which in turn benefits consumers. I have a strongly held view that part of the work we need to be doing is maintaining a strong competition culture for the United States. You might think that we should not have to be worried about maintaining that culture, since we have had it for so long. But individual interests are constantly pecking away at it. Former FTC General Counsel Bill Kovacic was always fond of saying that the FTC and the Antitrust Division are the ones who stand up for the market and not for any particular interest. You will hear me doing a lot of evangelizing, along with my colleagues here at the FTC, on this subject.

On the amicus brief side, courts are increasingly asking us to weigh in on competition issues, especially as private litigation has proliferated. Courts have wanted to strive for some consistency, so we are asked to weigh in. For example, the Solicitor General was just asked by the Supreme Court to weigh in on the *Dagher* case from the Ninth Circuit.

A lot of the advocacy work we do is behind the scenes. I gave a speech recently and talked a lot about our specific advocacy efforts, some of which we thought had been quite successful. For example, FTC staff and the Antitrust Division filed an amicus brief last year urging the West Virginia Supreme Court to reject a bar opinion that laypersons could not lawfully provide real

estate settlement services. We emphasized the lack of consumer harm from such lay services, and noted that banning them would drive up settlement costs for West Virginians.

But in addition to such advocacy efforts, we talk to Congress or to our colleagues in the federal government daily, answering questions about issues of competition or consumer policy. In that sense, it is like having clients.

ANTITRUST SOURCE: Do you see a need for new guidelines in any particular substantive area or industry?

MAJORAS: I do not see a need for something new. That is not to say that something will not pop up, of course. Guidelines are really important in areas in which we have had a record of experience. They are also important in particular areas that have special qualities, such as intellectual property, because they allow us to discuss our approaches to those particular areas. But at this moment, it is not apparent to me that there is a new area in need of guidelines.

ANTITRUST SOURCE: I'd like to ask a question about the Antitrust Modernization Commission. The list of topics that the commissioners are going to be focusing on is now on their Web site [www.amc.gov]. How do you plan to give input to the Modernization Commission to get the agency's views heard and understood as they study the issues?

MAJORAS: We already have been providing input to the Commission, and I am sure we will continue to do it. I am pleased to say that the members of the Commission are very interested in hearing the views of many of us here at the FTC, and we will continue to give them as much support as we can. As a matter of fact, we let them use our 601 New Jersey Avenue facility when they have meetings!

ANTITRUST SOURCE: Do you have any comments or points you'd like to add to what you've said so far at this point?

MAJORAS: I am often asked what I think is possibly the most important issue for the Antitrust Modernization Commission. I think that if the Modernization Commission could recommend elimination of all or virtually all exemptions and immunities from the antitrust laws, they would have accomplished a great deal. Most of those exemptions and immunities are dinosaurs. They were in put in place for particular reasons at certain times, but the markets have moved on. Markets have become far more global, and it is hard to justify most exemptions and immunities today. I think they are inconsistent with our general approach to competition and need to be eliminated. ●